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VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 76

JAMES GALLICK, PETITIONER,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OHIO, CUYAHOGA COUNTY

PETITION FOR CERTIORARI FILED MARCH 3, 1962
CERTIORARI GRANTED APRIL 16, 1962

[fol. 590] Thursday afternoon session,
1:45 p.m., June 18, 1959

Mr. Dudnik: If your Honor please, may I state that at the conclusion or just before the lunch hour, I decided that my cross-examination was concluded. I released Mr. Clason. I did not keep him over the lunch hour.

The Court: The defense may call its next witness.

Thereupon the Defendant, further to maintain the issues on its part to be maintained, called as a witness JOSEPH P. CORRIGAN, who, being first duly sworn, was examined and testified as follows:

Direct examination of Joseph P. Corrigan.

By Mr. Hadden:

Q. Mr. Corrigan, will you keep your voice up so we can all hear what you have to say.

Would you give us your full name, please?

A. Joseph Patrick Corrigan.

Q. Who are you employed by, Mr. Corrigan?

A. Baltimore and Ohio Railroad.

Q. Are you married?

A. Yes.

Q. Family man?

[fol. 591] A. Yes, I am.

Q. How long have you been with the B & O, sir?

A. Since March 1, 1941.

Q. What sort of job have you been employed in during that period?

A. As a trainman.

Q. Whereabouts have you been employed by the B & O?

A. On the Akron Division.

Q. Well, where is your headquarters and where do you usually report for work?

A. In Cleveland, Cleveland yard.

Q. Did I get your address, sir?

A. No, sir.

Q. Will you give it to us?

A. 15106 Rosemary Avenue.

Q. Mr. Corrigan, have you ever worked on what is known among the railroaders as the downtown job?

A. Yes, sir.

Q. What does that consist of?

A. Working, switching cars in the downtown area, freight house.

Q. Can you tell us for how long you have worked that particular job? Do you still work on it?

A. No, I do not.

Q. When did you work on it?

[fol. 592] A. Oh, I suppose the last time I worked on it would be about six months ago.

Q. Did you hold that job continuously for any extended period of time?

A. There were times—I worked it for three or four months, possibly longer.

Q. On a number of different occasions?

A. Yes.

Q. Will you speak up so we can all hear you?

A. Yes, sir.

Q. You are not talking quite loud enough. Are you acquainted with the Plaintiff in this case, Mr. Gallick, who is over there?

A. Yes, I am.

Q. Do you recall any occasions when you worked with him on the downtown job?

A. On numerous occasions.

Q. Numerous occasions. Would any of those occasions have been in the year 1954?

A. Oh, yes.

Q. Now, Mr. Corrigan, in the course of your work on the downtown job you had occasion, did you not, to pass under the Columbus Road bridge?

A. Yes, I have.

Q. And you know where that is?

[fol. 593] A. Yes, I do.

Q. I am going to show you some photographs and I would like to have you see if you can identify them.

Well, I will show you first Plaintiff's Exhibit No. 4, and can you tell us what that shows?

A. Yes, that's the Columbus Road bridge.

Q. That is the bridge which you testified that you have passed on numerous occasions?

A. Yes.

Q. Now, I will show you also Plaintiff's Exhibit 3, can you tell us where that was taken?

A. It is also under the Columbus Road bridge.

Q. If you will speak a little slower and a little bit louder.

The Court: I was just going to say, Mr. Corrigan, speak up so the last juror there can hear you.

Q. Now, what is the fact, Mr. Corrigan, as to whether or not there has existed underneath that bridge any stagnant water during the time you have been familiar with it?

A. Yes, there has been standing water there as long as I have worked near there.

Q. What is the fact, sir, as to whether or not taking an area extending say 100 feet north and 100 feet south of that area, using geographic directions, you have ever seen any dead pigeons in that area?

[fol. 594] A. Yes, sir.

Q. What would you say, sir—

Mr. Dudnik: Is that a hundred feet north and south of the bridge?

Mr. Hadden: That's right.

Mr. Dudnik: Thank you.

Q. What would you say, sir would be the maximum number of dead pigeons which you have seen on any one occasion in that area that we have just referred to?

A. Possibly two or three.

Q. That is, two or three pigeons on any one time?

A. On one occasion.

Q. Have there been times during the time that you have been familiar with this area when there have been no pigeons at all in that area?

A. Dead pigeons?

Q. I am referring to dead pigeons.

A. Yes, there have been times when there have been no dead pigeons.

Q. Sir, with reference to dead rats, what would you say is the maximum number of dead rats which you have ever seen in the same area that we are talking about?

Mr. Dudnik: Are you talking a hundred yards either way, all inclusive? A hundred feet either way, Mr. Hadden? [fol. 595] Mr. Hadden: That is correct.

Mr. Dudnik: So that I understand. Thank you.

Q. Do you have the question in mind?

A. No. Would you please repeat it?

Mr. Hadden: Would you read the question?

(Last question read by the reporter.)

A. Possibly one. Two at the most.

Q. As to the occurrence of dead rats in that area, sir, would you say that was usual or frequent, or unusual or very seldom, or how would you describe it?

A. I would say that would be unusual.

Q. Would you say it was a rare occasion?

A. On rare occasions you would see a dead rat.

Q. With regard to insects, sir, can you tell us what observations you have made as to the numbers and types of insects in this same general area during the time that you have worked there?

Let's take the number first, what can you say as to that?

A. You would see flies and mosquitoes, but not in great numbers.

Q. Based upon your observations, have the numbers of insects which you have seen there been greater than or less than or about the same as the entire flats area generally? [fol. 596] A. I would say it would be the same as the flats area in general.

Q. And you mentioned flies and mosquitoes. Can you think of any other varieties of insects which you have had occasion to see in that particular area?

A. Occasionally you would see what we call a dragon fly.

A. A dragon fly?

A. Yes.

Q. Can you think of any other types of insects?

A. No, I can't.

Q. Well, what is the fact as to whether or not you have seen any insects of any usual or different varieties from those we are all familiar with in this part of the country?

A. I never specifically seen any that would be unusual, I mean, they would be the usual insects, nothing that—

Q. Thank you. Are you acquainted with the safety committee meetings which are held on the B & O?

A. Yes, I am.

Q. Have you ever attended any of those, sir?

A. Yes, I did.

Q. Where did you attend such meetings?

A. In the depot, in the old B & O depot.

Q. Can you tell us what the purpose of holding those meetings is, as far as the railroad is concerned?

A. To report any unsafe conditions.

[fol. 597] Q. And how often are they held?

A. Once a month.

Q. How are the persons who attend such meetings selected, or what determines who attends them?

A. I was selected by the trainmaster. He appointed me.

Q. I am not referring specifically to yourself. But is it a fact that from all various departments of the railroad there are people who attend?

A. There is a representative from the Operating Department and from the roundhouse and from the office forces.

Q. If I understood your answer to the last question correctly, you yourself were designated on one occasion as the brakeman who attended, were you?

A. That's right.

Q. For what period of time was that, sir?

A. I believe about six months.

Q. Was that in the year 1954?

A. Yes, it was.

Q. Are you a member of the Brotherhood of Railroad Trainmen, Mr. Corrigan?

A. Yes, I am.

Q. What is that organization?

A. It is actually a union of railroad employees and trainmen.

Q. Does the Brotherhood of Railroad Trainmen have any procedures in and of itself apart from procedures which [fol. 598] may exist on the railroad, for reporting and remedying unsafe or unsanitary conditions on the railroad property?

A. Yes, they do.

Q. Would you describe those, please?

A. Well, in the course of a meeting it is asked from the floor if there are any unsafe conditions to report.

Q. And what happens if such condition is reported?

A. Well, the local chairman will take it up with the superintendent and correct it. If it is not corrected it would be—

Q. Who is the superintendent, so the jury can understand that.

A. The superintendent?

Q. I don't mean his name, but what is he?

A. He is head of a division.

Q. And where is his headquarters?

A. In Akron, Ohio.

Q. He has jurisdiction over the Cleveland area among others, does he?

A. Yes.

Q. And what happens further as a complaint of that nature is progressed?

A. Well, if the superintendent doesn't handle it to the satisfaction of the local chairman, the local chairman will take it up with the general chairman, and it is taken, to [fol. 599] Baltimore and handled with the labor relations department.

Q. If having followed that procedure the condition of which the complaint is made is still uncorrected, what happens after that, if anything?

A. It could be further handled with the Interstate Commerce or the Public Utilities Commission.

Q. What has been your experience, Mr. Corrigan, as to the general effectiveness of the procedures which you have just described?

Mr. Dudnik: Objection as to the general effectiveness of the complaints. I don't think that is material here at all. The question is how it is done.

The Court: There was a first part to that question.

Mr. Hadden: The question wasn't completed in the first place.

Mr. Dudnik: I am sorry, I withdraw my objection until you complete your question. I am sorry.

The Court: Restate the question.

Q. What has been your experience, Mr. Corrigan, as to the effectiveness of the Brotherhood procedures for handling complaints such as you have described, in so far as getting the complaints remedied and the conditions com-
[fol. 600] plained of corrected?

Mr. Dudnik: There is an objection.

The Court: He may answer.

A. They are very effective.

Q. Have you or have you not ever been an officer of the Brotherhood?

A. Yes, I have.

Q. During the course of your work, Mr. Corrigan, as long as you have been employed by the B & O Railroad, have you ever made yourself any complaints of the conditions which we have talked about underneath the Columbus Road bridge to anyone?

A. No.

Q. Have you heard of any other employee of the railroad who has made such a complaint?

A. Well, I never handled a complaint myself, so I don't know offhand whether there has ever been any.

Q. As far as you know, there has not been, is that right?

A. That's right.

Q. Have you ever yourself been bitten by an insect underneath or in the vicinity of the Columbus Road bridge?

A. Very possibly.

Q. Well, if you have been, what sort of a bite would that have been, if you can remember?

[fol. 601] A. Possibly a fly or a mosquito.

Q. Have you heard of any other people on the railroad apart from Mr. Gallick who have sustained such bites in the same area?

A. No, I haven't.

Q. So far as your own experience is concerned under the bridge or in that vicinity, whatever bites that you may have had there, have they been more frequent or less frequent than you have received any place else, at home or elsewhere?

A. No, I would say the condition is normal.

Q. Just the same as any place else?

A. Yes.

Q. During the course of your employment by the railroad have you ever heard of any complaints of any nature with reference to sanitary conditions on the job there in the general area around the Columbus Road bridge?

A. When I was on the safety committee I handled a complaint for a drinking fountain in the locker room. There was a tin cup on the wall, and we handled that at the meeting.

Q. So we can be sure where that was, was that—where is the locker room to which you refer?

A. In the basement of the old depot.

Q. So the jury can understand where that is, will you step down just a second and point out where the old depot is?

Do you want to come over here so you won't block their [fol. 602] view.

This is the Superior Bridge, this is the Cleveland Union Terminal Bridge, this is the Columbus Road Bridge in the red circle, and will you point out the old depot?

The Court: Will you stand to the side.

Q. This is the Carter Street Bridge, will you point it out, just for the sake—is this not the old passenger depot?

A. Yes, that is.

Q. All right, you may take the witness stand again, Mr. Corrigan. Can you give us any idea of how far that area, the station or old depot is from the Columbus Road bridge itself, in your own approximation?

A. Possibly 300 feet.

Q. Have you ever heard of or handled any complaint, any safety complaint, with reference to the Columbus Road bridge itself, sir?

A. No, I don't believe I have.

Q. Well, to refresh your recollection, Mr. Corrigan, isn't it a fact that at one point you had some complaint made about the close clearance involved there?

A. Well, it didn't involve the close clearance specifically. The telltales that were warning the trainmen on top the

cars were down, and that was brought up at the safety meeting.

Q. So the jury can fully understand what that refers to, [fol. 603] telltale is the string that hangs down from an overhead wire?

A. Yes.

Q. The trainmen hit that, do they, how does that work?

A. If you are riding on the top of the car it will brush you and warn you.

Mr. Dudnik: You better bend down then?

A. Yes.

Q. What can you yourself say based on your own experience, Mr. Corrigan, as to the clearance between boxcars and what have you under that bridge and the bridge itself?

A. It is quite close. It is definitely a close clearance.

Q. One final question, Mr. Corrigan. Have you had occasion to observe at any time in the vicinity in the general area which we are discussing, showing you for the purpose of the question on the picture over there, conditions in and about the New York Central tracks in the vicinity of the Cleveland Union Terminal?

A. In the general vicinity of Seneca Street Yard there is a garbage pail, I imagine that is what they call it, where they dump the garbage and refuse when they clean the coaches in the Terminal.

Q. I wonder if you would step down, again, to the easel there and see if you can locate that, the garbage dump that you referred to.

[fol. 604] Mr. Dudnik: You can point it out to him. The picture is confusing.

Mr. Hadden: All right.

Mr. Dudnik: The witness seeing this for the first time is easily confused.

Mr. Hadden: This is the passengers' depot, and this is Canal Road here, and these I believe are the tracks. Will you stand back just a little bit.

A. The Sherwin-Williams building wouldn't be shown here.

Q. Well, on what street was the area located?

A. Columbus Road.

Q. Columbus Road, are you sure?

A. Canal Road.

Q. Canal Road?

A. That's right.

Q. How far off the edge of the picture would you say it was located? You may take the stand.

A. Four or five hundred feet, I imagine.

Mr. Dudnik: You mean beyond the edge of that picture?

A. Yes.

Q. Have you had occasion, sir, to observe in that area any rats or pigeons or other forms of life?

A. Yes, I have.

[fol. 605] Q. What would you say as to the frequency of your having seen those in that location?

A. Quite often the door was left open, and there were pigeons and rats feeding on the garbage.

Q. Have you ever seen any dead rats or dead pigeons in the same vicinity?

A. Yes.

Q. The garbage pit or dump, whatever it may be, that we have just been talking about, is that on B & O property?

A. No, it is not.

Mr. Hadden: You may examine.

Cross examination of Joseph P. Corrigan.

By Mr. Dudnik:

Q. I take it, Mr. Corrigan, you are telling us that conditions were worse on the New York Central than they were on your railroad?

A. At the two particular points that I was questioned on, I would say yes.

Q. And between an area, of an area about 100 feet this way, and 100 feet that way—I am going on both sides, I am going north and south of the Columbus Road bridge, the most you ever saw was one or two rats in that two hundred foot area?

A. Yes.

Q. And the two or three dead pigeons, I presume, would [fol. 606] be somewhere in this two hundred foot area?

A. Yes.

Q. That is two or three?

A. Yes.

Q. And that would include the ditch we talked about, wouldn't it?

A. Yes.

Q. How many would be in the ditch, and how many of the other one or two pigeons would be in the two hundred foot area?

A. The two hundred foot area would include the ditch.

Q. What?

A. The two hundred foot area would include the ditch.

Q. It would include the ditch?

A. Yes.

Q. And those two or three dead pigeons that you saw, at the most at any one time, when you did see two, where did you see one, and where did you see the other?

A. Well, somewhere in that area laying on the ground. I couldn't just pinpoint where.

Q. How close can we get to the ditch?

A. I just couldn't pinpoint where I saw the one today and where I saw it the next day.

Q. Would you see that often, or would it be cleaned up and be nice and clean?

A. I never saw it cleaned up.

[fol. 607] Q. You never saw it cleaned up. You mean they were there all the time?

A. They would be there until they disintegrated or rotted or whatever happened.

Q. They lay there until they rotted and disintegrated, is that right, Mr. Corrigan?

A. Yes.

Q. And you worked in that area how long, sir?

A. Since 1941. 19 years.

Q. 19 years; pretty often during that time?

A. Yes.

Q. Still there, you still work there?

A. Yes, I do.

Q. For the B & O?

A. Yes.

Q. And had you seen standing water under the bridge as long as you have worked there?

A. Yes, sir.

Q. True, isn't it?

A. Yes.

Q. And that was when they had two sets of tracks, too, wasn't it?

A. That's right.

Q. And you saw the same standing water before they changed to one track, and after they changed to one track. [fol. 608] isn't that so?

A. Yes.

Q. No difference in the appearance of it, was there, I mean generally?

A. That's right.

Q. That is correct, isn't it?

A. Yes.

Q. You have seen dragon flies under the bridge and you have seen mosquitoes under the bridge. What do you call an unusual bug?

A. Well, I would say I suppose a bug that I never seen before.

Q. I think that is a good statement. Now, what bugs have you ever seen in your life besides the mosquito and a dragon fly?

A. I really couldn't answer that question.

Q. Do you recall of any other type of bug you have ever seen besides a mosquito and a dragon fly?

A. I couldn't give you a name for it. I have seen them, yes.

Q. No, no. Describe them.

Mr. Leasure: Do you mean there, or at any place?

Mr. Dudnik: Well, we will get first any place, and then we will take it there, Mr. Leasure.

Mr. Leasure: I am objecting unless the question is clarified. It is not clear at all.

[fol. 609] Mr. Dudnik: Let's say any place.

Q. First I want to know the kind of bugs you have ever seen, and then we will talk about whether you have seen them in this area; unless you can't recall seeing any place any other bug outside of a mosquito or dragon fly or insect?

A. Naturally I have seen other insects, yes.

Q. Have you seen hard-shelled, brown bugs, an inch in size, ever?

A. Are you referring to a June bug?

Q. Yes.

A. Yes.

Q. You have seen June bugs?

A. Yes.

Q. Have you seen any there at any time under the bridge, or in that area?

A. I don't know.

Q. You don't know. You don't recall whether you have or not, is that it?

A. That's right.

Q. Is that a fair statement?

A. Yes.

Q. Have you seen bugs two inches in size anywhere in your life?

A. I don't believe I have.

Q. An inch and a half?

[fol. 610] A. I can't answer that question. I don't know.

Q. Can you recall at any time in your life that you had ever seen a bug an inch and a half long?

A. Yes.

Q. All right. Have you ever seen any in that area?

A. Yes, I am referring to a dragon fly, I have seen them there.

Q. No, I am talking about a brown hard-shelled bug or insect.

A. No.

Q. Never in your life seen one?

A. No, I haven't.

Q. Would you say that an area that had dead birds and pigeons and other insects where men were working would be an unsafe area?

Mr. Leasure: Objection, your Honor.

Mr. Dudnik: He is a safety man and testified about complaints and everything else, your Honor.

Mr. Leasure: That calls for a conclusion, and grossly incomplete.

Mr. Dudnik: Your Honor, he testified as a safety man as to what conditions were safe, that he would report it if they weren't.

The Court: He testified he had been on the safety com-
[fol. 611] mittee. I don't think that the basis for the qualifications of this man have been established.

Q. Now, then, may I put it to you this way: Would you report as the safety man an area alongside of the tracks which had water in it, stagnant water alongside of it, which contained dead pigeons and birds, would you report such a condition as unsafe?

Mr. Leasure: We will object to that, your Honor, unless more detail is given.

The Court: He may answer that question.

A. I have never reported that area.

Q. No, that isn't my question. You may never have seen it and that's why you didn't report it. Will you read the question?

(Question read by the reporter.)

Mr. Leasure: I think I will object to the last question, your Honor. He has answered it by saying he never saw such a condition. Then from there on it becomes hypothetical as to what he might do.

The Court: This question is a little different than the previous question to which you objected and which objec-
[fol. 612] tion the Court had sustained. I am going to overrule this objection and the witness may answer the question.

Q. Did you understand the question, sir?

A. No.

Q. We will have it read to you again.

(Following question was read by the reporter:)

"Now, then, may I put it to you this way: Would you report as the safety man an area alongside of the tracks which had water in it, stagnant water alongside of it, which contained dead pigeons and birds, would you report such a condition as unsafe?"

A. I don't know, I don't know.
Q. You don't know?
A. No, I don't.
Q. And if that condition also had insects around it, besides the dead rats or dead pigeons and birds, would you then report it as the safety man?

Mr. Leasure: Objection, your Honor.
The Court: He may answer.
Mr. Leasure: It becomes argumentative.
The Court: He may answer.

A. I wish you would clarify the question. Would you repeat it, please?
Q. I will have it read to you again, sir. Tell me what part of it you don't understand and I will most certainly clarify [fol. 613] it for you.

(Last question read by the reporter.)

A. Yes, yes, I would.
Q. You would?
A. Yes.
Q. Would you report it if you worked around there and were not a safety man?
A. Yes.
Q. Did you ever report such a condition?
A. No, I did not.

Mr. Dudnik: Mark this, please.

(Plaintiff's Exhibit 24-A and 24-B were marked for identification by the reporter.)

Q. Mr. Corrigan, you of course have always told the truth about what you knew about this case, had you not?
A. Yes, sir.
Q. You had a meeting with the Claim Agent the other day?
A. Yes, sir.
Q. You went over the facts?
A. Yes, sir.
Q. And you had a meeting before that, did you not, with the Claim Agent?
A. Yes.

Q. You went over the facts?

A. Yes.

[fol. 614] Q. No matter whom you told about this in the past, whether it be the Claim Agent or anyone else, you would never misstate the facts, would you?

A. No, sir.

Q. Would you read this signature here, please, on Plaintiff's Exhibit 24-A?

A. Joseph P. Corrigan.

Q. Who signed that?

A. I did.

Q. Mr. Corrigan, will you read this signature here?

A. Joseph P. Corrigan.

Q. Did you sign that?

A. Yes, I did.

Mr. Dudnik: Now, Mr. Leasure, I am going to read out of context because it makes my point, but I will include the whole thing later.

Mr. Hadden: Say that again, what are you going to do?

Mr. Dudnik: I am going to read out of context but I will include the whole report later.

Q. Now, I want you to read with me and see if I read correctly, this statement:

"I have been here employed by the railroad and that sewage and water has been there for at least 15 years."

Was that a truthful statement?

[fol. 615] A. Yes.

Q. You made that statement?

A. Yes, I did.

Q. In this report?

A. Yes.

Mr. Leasure: Your Honor, before this goes any further, I would like to object for the record. There is no inconsistency between what has been read and what he testified to.

The Court: I think Mr. Dudnik made it clear he was reading out of context, and if you want to take the time and have him read the entire statement, it is all right with the Court.

Mr. Leasure: Well, our point is, your Honor, we are objecting to the relevancy of this, since his testimony has not conflicted with what he said here.

Mr. Dudnik: If you just let me read the next sentence, Mr. Leasure.

Mr. Leasure: Well, why don't you start where you claim an inconsistency exists?

Mr. Dudnik: May I try the lawsuit my way, Mr. Leasure?

Mr. Leasure: As long as you do it properly. I am objecting.

[fol. 616] The Court: Mr. Dudnik has stated he is laying the foundation. I want to see what the foundation is.

Q. That is what you said, sir?

A. Yes.

Q. And it was the truth?

A. Yes, sir.

Q. And you had read this statement before you signed it, hadn't you?

A. Yes, I have.

Mr. Leasure: I can't hear what the witness said.

Mr. Dudnik: He said yes.

The Court: Mr. Corrigan, speak up so the last juror there can hear you and the lawyers on the other side of the table can hear you.

Mr. Leasure: Your Honor, my principal problem is that Mr. Dudnik insists apparently in standing between me and the witness.

Mr. Dudnik: I am sorry. Shall I stand over here? I want the witness to read this with me. Is this better for you?

Mr. Leasure: All right. I just want to hear what he says, that's all.

Mr. Dudnik: Fine.

[fol. 617] Q. Now, we will go over to the next sentence: "There has been dead birds and pigeons there, also, and perhaps the insects have come from that."

Did you say that?

A. Yes, I did.

Q. "The only thing the railroad would have to do to get rid of this pool of water and sewage and other dead animals and birds would be to put in a sewage system."

Did you say that?

Mr. Leasure: Just a moment. Nothing was said in his direct testimony about that. Nothing has been shown that he has any knowledge of the situation, or the problems involved, and I think I will object to any inquiry along that line, unless it is first shown that he is qualified, and then if he is asked a question about it directly. Then if he gives an answer contrary to what is said there, it might be relevant.

The Court: Are you talking now about the physical condition?

Mr. Leasure: A possible solution. That is what he is now talking about.

Mr. Dudnik: No, your Honor. He understands that this man had testified that he would make a report under [fol. 618] certain conditions. Now I want to show what he told us the conditions were, and that is exactly in line with the questioning I started, and I am laying a foundation.

The Court: The witness may answer.

Mr. Dudnik: Read that question, please, and the answer.

(Last question read by the reporter.)

A. Yes, I did.

Q. Did you further say, "There may be a sewage system there, but it may be clogged up."

Did you say that?

A. Yes, sir.

Q. Mr. Corrigan, you were the safety man there representing the railroad employees for some time, were you not?

A. Yes.

Q. And how long did you serve as a safety man representing the railroad employees?

A. I was on the committee for about six months.

Q. And when was that, sir?

A. In 1954.

Q. 1954?

A. Yes.

Q. That is about the same time that Mr. Gallick was hurt, is it not?

[fol. 619] A. Yes.

Mr. Leasure: We object to that, your Honor. The phraseology, anyway, is certainly—

Q. Was stung or bitten, is that not so?

A. Yes.

Mr. Leasure: Go ahead, I won't object, go ahead.

Mr. Dudnik: Thank you.

Q. And as safety man, you, your job was to report all unsafe conditions to the company on behalf of your co-workers, isn't that a fact?

A. Yes, sir.

Q. Did you ever report to the company anything about the condition that I just read to you from in your statement?

A. No, sir.

Q. Did you know how and where Mr. Gallick got his trouble?

A. I do not know.

Q. I believe you said that you had heard several rumors?

A. That's right.

Mr. Leasure: I still object to this. It is right in the statement, why don't you read it to him, just like you read the rest of it?

The Court: I am assuming that the statement will become part of the evidence, and either side will have a right to [fol. 620] refer to the statement.

Mr. Dudnik: May I have the question read, your Honor?

(Question and answer were read by the reporter.)

Q. Who did you hear these rumors from?

A. From my co-workers, From the co-workers.

Q. From how many co-workers did you hear these rumors?

A. I really can't say.

Q. Were there many or few?

A. I will say five or six.

Q. Well, so we may go over the rest of this statement, which may not be by way of contradiction, if you want to object, but I want to get the whole statement in; do you object if I do?

Mr. Leasure: I object. If you are going to offer it, I object to reading it. I object to the duplication. I may object to it upon introduction, but let's proceed in an orderly manner.

OFFERS IN EVIDENCE

Mr. Dudnik: I offer Plaintiff's Exhibit 24-A and 24-B into evidence.

Mr. Leasure: I am objecting to it.

The Court: Objection overruled. The exhibit will be received into evidence.

Mr. Leasure: Now, to answer your question, Mr. Dudnik, [fol. 621] I will have no objection if you want to read from it.

Mr. Dudnik: You read it. You have your objection, now read it.

Thank you, Mr. Corrigan, I have no more questions.

Redirect examination of Joseph P. Corrigan.

By Mr. Hadden:

Q. Mr. Corrigan, what do you recall about the circumstances under which this statement was taken?

A. Someone representing Mr. Gallick came out to my house.

Q. Do you remember how long ago that was?

A. It would be two or three years, anyhow. I think about three years.

Q. Did he identify himself to you?

A. Apparently he did, or I wouldn't have gave him a statement.

Q. Does your memory now hold to the fact that he did say who he was?

A. Yes, he did.

Q. Do you recall that he did?

A. Yes.

Q. And you talked the matter over with him, did you?

A. Yes, I did.

Q. And for how long a time was this subject under discussion?

[fol. 622] A. For a very short length of time.

Q. Did you say where this was, at your home did you say?

A. Yes.

Q. How did these pieces of paper come into existence?

A. How did they come into existence?

Q. Who wrote them down, who wrote the words appearing apart from the signature?

A. The representative, the man who represented himself as representing Mr. Gallick.

Q. And this is his handwriting, then, the man's, except for the signature?

A. Yes.

Q. Did you dictate this to him, or is this his selection of language?

A. Well, we talked it over. I don't remember him writing it down exactly as I said it.

Q. It was his choice of words, then, in other words? Isn't that what you said?

A. Yes.

Q. One or two more questions, Mr. Corrigan. I will read to you a brief portion of this. It is written here on the statement the following: "I have heard several reports of how he was injured. One of them" referring to Mr. Gallick, of course,— "One of them seemed to be that he was bitten by an insect at the C.L. & W. yard at West Third [fol. 623] Street" — do you know what that is, the C.L. & W.?

A. Yes, I do.

Q. What is it, would you tell us that?

A. It is a separate yard from Seneca Street, or Clark Avenue yard.

Q. Do the initials C.L. & W. stand for something?

A. It was a railroad that was incorporated with the B & O.

Q. It is part of the B & O?

A. Yes.

Q. Well, continuing the text of this: "Insect at the C.L. & W. yard at West Third Street and Quigley Street," can you tell us where that location is, sir?

A. West Third and Quigley?

Q. Yes.

A. In relation to what?

Q. Well, can you tell us where in relation to the Columbus Road bridge it is, for example, how far away in terms of miles?

A. It would be a mile or two anyhow.

Q. A mile or two. Handing you this statement, Mr. Corrigan,—I will withdraw the question. We have no further questions.

Recross examination of Joseph P. Corrigan.

By Mr. Dudnik:

Q. I think I have one or two questions, Mr. Corrigan. Mr. Hadden stopped in the middle of a sentence. I want to [fol. 624] finish the sentence.

He read, "I have heard several reports of how he was injured," did he not?

A. Yes.

Q. "One of them seemed to be that he was bitten by an insect at the C.L. & W. yard at West Third Street and Quigley," is that the end of a sentence?

A. No, it is not.

Q. Finish it, finish reading that sentence.

A. "And another place at a ditch which lies along the B & O right-of-way between Columbus Road bridge and Carter Street bridge."

Q. That is the end of the sentence?

A. Yes.

Q. Now, you wouldn't have signed this if it wasn't true, would you?

A. No.

Mr. Dudnik: Thank you very much.

Further redirect examination of Joseph P. Corrigan.

By Mr. Hadden:

Q. One more question. Mr. Corrigan, have you ever seen twenty to thirty pigeons, dead pigeons and dead rats, in an area of two hundred feet on either side of the Columbus Road bridge?

[fol. 625] A. No, sir.

Q. If you had, would you have reported that?

Mr. Dudnik: Objection. What he would have done—objection.

The Court: He may answer. I permitted him to answer.

Mr. Dudnik: Okay.

The Court: What is your answer, Mr. Corrigan?

A. I don't know.

Mr. Hadden: That is all we have.

The Court: Ladies and gentlemen of the jury, there will be a brief recess.

You will return to the jury room once more with the admonition that you do not talk about this case with anyone, not even amongst yourselves.

(Thereupon a recess was taken.)

[fol. 626] Thereupon, the Defendant, further to maintain the issues on its part to be maintained, called as a witness Dr. Louis A. Stearns, who, being first duly sworn, was examined and testified as follows:

Direct examination of Dr. Louis A. Stearns.

By Mr. Hadden:

Q. Doctor Stearns, you were here a minute ago and you see that it is necessary to keep your voice up, so if you will please do that I will appreciate it.

Can I have your full name, please?

A. Louis A. Stearns.

Q. Where do you live, Doctor Stearns?

A. Newark, Delaware.

Q. What is your business or profession, Dr. Stearns?

A. I am a medical entomologist.

Q. That is a big word; can you tell us a little bit about what it means, the word entomologist?

A. It is concerned with insects that transmit, are related to disease. Entomology has to do with insects and things like that.

Q. Would it be fair to say if you are an entomologist you are generally concerned with the habits of insects, is that right?

A. Yes.

[fol. 627] Q. Doctor, can you tell us a little bit about your training and education in this field? First of all, did you attend any college or university?

A. Well, I will have to go back about 45 years. I completed my pre-medical training with a four year course at Ohio Wesleyan University, getting a B.A. degree in 1915.

Then I went to Ohio State and took advanced medical studies, including medical entomology, and eventually instead of going into medicine I went in entomology, and I have a Master of Science degree and a Ph.D. in biological sciences.

Q. What university it that?

A. Ohio State.

Q. Does that complete your training?

A. Except I completed a course in tropical medicine in the Army Medical School just prior to World War II.

Q. What, sir, has been your experience apart from formal —what has been your experience apart from formal educational training in the field of entomology?

A. Well, I have been instructor in zoology and entomology at Ohio State, professor of biology in the Alma College in Michigan.

Q. College of what?

A. Professor of biology in Alma College, Michigan. I have been an associate state entomologist in Virginia, in New Jersey, and Ohio; and for 28 years I was head of the [fol. 628] Department of Entomology in the University of Delaware, and retired in '57.

Q. Do you now hold any post with any educational institution, Doctor?

A. I am simply emeritus head of the department.

Q. That means you are retired?

A. I am retired but I have all the facilities to work there.

Q. Does that describe pretty much your training and experience in the field?

A. Except during World War II, for three years I was chief sanitary officer of the U. S. Ninth Air Force in Libya, Egypt, and India. In the European Theater I was staff entomologist on the supply run to Russia, and I also taught in the Army Medical School in Panama.

Q. Are you a member of any professional societies or associations having to do with this general field?

A. I have either been a president or vice-president of the major societies in entomology.

Q. Can you give us an example so there will be no question?

A. Well, the American Association of Economic Entomologists; the Entomological Society of America; and the American Mosquito Control Association. I have either been a president or vice-president of each of these organizations.

Q. Having all this in mind, Doctor, would it be fair to say that you are a bug expert?

A. I call myself a bug doctor.

[fol. 629] Q. Doctor, did you at our request at any time happen to have occasion to visit the flats area of the City of Cleveland?

A. Yes. I spent about three hours on Tuesday, and I walked over the area which seems to be the area of interest, and covered the flats area down to what is it, Clark Avenue, Clark Street, or something like that.

Q. Well, in connection with your visit down there, did you have occasion, sir, to visit the area in the vicinity of what is known as the Columbus Road bridge and the B & O Railroad tracks?

A. I did.

Q. Now, I will show you some pictures and ask you whether you can identify them.

Doctor, showing you first Plaintiff's Exhibit 4—I will give them to you all at once in order to save time—do you want to look at all of these, sir; I guess it is Exhibits 1 through 4, just for the purpose of identifying them.

A. Yes. I walked over this area. This is the Columbus bridge?

Q. Yes.

A. Right here.

Q. And you are pointing to the bridge shown in Plaintiff's Exhibit 4?

A. Yes.

Q. Will you look at the other one, sir, please?

[fol. 630] A. This looks like a closeup view of this, under this same bridge?

Q. That is the bridge which you visited?

A. Yes.

Mr. Dudnik: What is that number, please?

Mr. Hadden: That is Exhibit 3.

Q. And the other pictures show the same general area, do they not?

A. Going in the other direction. And this is the same.

Q. Exhibit 1 is another view. Doctor, for the purposes of this question, I will ask you to assume that for some time underneath the bridge which is shown in the pictures, and which you have visited, there existed a pool of standing water of the same approximate size and location as shown in those pictures which I have just showed you.

That there were present in the area, in the same area, quantities of dead pigeons and possibly some dead rats at the time we are interested in, which was the month of August.

I will ask you, Doctor, if you have an opinion, based on those assumptions, whether any types or varieties of insects which are likely to attack human beings could reasonably be expected to be attracted to or be present in that area because of those conditions, and I will ask you just to say yes or no as to whether you have an opinion?

[fol. 631] A. You are asking whether I have an opinion?

Q. That's correct.

A. Yes, I do.

Q. And will you tell us what the opinion is, sir?

A. I would say from observing it this week, about the only two insects to be concerned, about the only insects that would be concerned would be mosquitoes.

Q. When you said two insects—

A. I was thinking of two species, two species.

Q. As far as you are concerned, mosquitoes are the only risk presented by this area?

A. That's right.

Mr. Dudnik: Only what, risk?

Mr. Hadden: Only risk presented by this area, so far as insects likely to attack human beings.

A. That's right.

Q. Now, Doctor, you are familiar, are you, sir, with the types of varieties and diseases of insects which may generally be found in this part of the country?

A. Oh, yes. I have lived for eight years in Ohio.

Q. Do you know of any insects native to this area which is likely to attack a human being, which approximates two inches in length and one-half inch in diameter, or roughly speaking, the size and shape of my little finger or yours? [fol. 632] A. That size in this particular area?

Q. Yes, sir.

A. I don't know of any that would attack man.

Q. What, sir, is in your opinion the insect which comes the closest to that size which would be so likely to attack a human being?

A. The closest insect to that size would be one of the—it would be the largest horse fly in this area.

Q. What, sir, is the largest size that those have been recorded to have reached?

A. Well, the body runs approximately—

Q. I didn't get the word you used; the what?

A. The body runs approximately one to 1-1/8 inches long. It is about a quarter to 5/16 inch thick.

Q. That is considerably less, would it be fair to say, than half the size of the other insect?

A. Well, at least half, possibly a little more.

Q. Would it be reasonable to assume, Doctor Stearns, that horse flies would be attracted to, or would breed or feed in the area which I have described containing the pigeons and rats underneath the Columbus Road bridge?

A. No, they would not.

Q. Would it be reasonable to—

Mr. Dudnik: Just a minute, please. Would you read the question?

[fol. 633] (Last question read by the reporter.)

A. And my answer was no, they would not.

Q. Doctor Stearns, would it be reasonable to assume that a horse fly such as you have described which happened to be passing through this area in a casual way, although not attracted by it, could be expected to alight upon any of the dead animals which we have mentioned, or come in proximity to the standing pool of water?

A. I wouldn't say they would alight on dead animals because they are simply interested in live animals, that is their prime interest.

Q. Doctor, I will ask you to assume for the purposes of this question that a man about 5 feet 9 in height, and weighing 205 pounds, is walking along a railroad track; that he is wearing shoes on his feet which extend to about one or two inches above his ankle, and socks which extend about an inch above those.

That he is also wearing cotton khaki trousers of the usual type, the bottoms of which or the cuffs of which extend to about the top of his shoes.

That at a certain point in his walking he stops, he turns around, faces in the direction from which he came, and stands still for about one-half to three-quarters of a minute.

That he then turns in the direction which he was originally walking, and after taking about two steps feels a [fol. 634] bite or sting which he describes as being of an insect about an inch or two above the back of one of his knees and inside his pant leg.

Doctor, on those assumptions do you have an opinion as to the length of time that the insect was on the man's body or clothing prior to the time that he felt the bite, and again a yes or no answer as to whether you have an opinion?

A. Yes, but what I want, are these pants free like these, or tucked in?

Q. Yes, free.

A. They are free?

Q. Yes.

A. Yes, I have an opinion on that.

Q. And would you state, sir--

Mr. Dudnik: Just a moment. Your Honor, I will ask you whether you recollect any testimony as to the pants being free? I don't know. If there is no such testimony I will object. But I have no recolllection.

The Court: There wasn't any testimony that they were tight against the shoes.

Mr. Dudnik: Nor was there any that they were free.

The Court: The only testimony was that they were the normal every day pants trousers that are worn by work-[fol. 635] men working in this type of work, as I remember.

Q. Doctor, would you amend the question to assume the fact which the Court has just stated, that it was an ordinary type.

A. No, no--yes, I have an opinion about that.

Q. Now, will you tell us what your opinion is as to the length of time which would be necessary?

A. I would say it was highly improbable that an insect could reach that point inside of five or possibly ten minutes from the time that it got on the ankle, at least five or ten minutes.

Mr. Hadden: You may examine, Mr. Dudnik.

Cross examination of Dr. Louis A. Stearns.

By Mr. Dudnik:

Q. I want you to be patient with me, Doctor. I never heard of the word entomologist until last week. Did you come here from Newark, Delaware, for the purpose of testifying in this case?

A. That's right.

Q. Newark is how far from Baltimore?

A. Oh, it is about 60 miles. It is right in the outskirts of Wilmington, put it that way.

Q. Are you a bacteriologist?

[fol. 636] A. Am I a what?

Q. Withdraw that. Have you studied bacteriology?

A. I have.

Q. Have you ever cultured dead rats?

A. I have taken only a four-hour course in bacteriology in pre-medical training.

Q. Four hour?

A. That is the regulation course.

Q. Have you ever cultured dead rats?

A. No.

Q. Have you ever cultured dead pigeons?

A. No.

Q. You do not know what if any bacteria would be prevalent or be found on decaying dead rats?

A. I cannot give an official opinion or professional opinion on it.

Q. You don't think you are qualified, is that it?

A. I am an entomologist.

Q. And the same with dead pigeons?

A. That's right.

Q. When you visited the Columbus Road area the other day did you see an area of water under the bridge that was similar to the ones you have been shown in these pictures?

A. Less extensive.

Q. Less extensive. Did you see any dead rats in them? [fol. 637] A. No.

Q. Any dead pigeons?

A. No.

Q. Any bugs flying around?

A. Yes.

Q. Any insects?

A. Have I seen insects?

Q. Yes.

A. Yes, I saw insects. Bugs are insects.

Q. I am sorry, I told you I didn't know.

What are these aquatic bugs?

A. Beg pardon?

Q. What is an aquatic bug?

A. Well, simply an insect that lives and makes its living around water.

Q. Clean and dirty?

A. Clean or dirty, either one.
Q. Clean or dirty, either one?
A. That's right.
Q. Where do you find them, do you find them anywhere?
A. Oh, yes.
Q. Do you find them in Cleveland? Correct?
A. Oh, sure.
Q. I take it then that in this area you may find aquatic insects around clean and dirty water?
[fol. 638] A. Yes. You can find them anywhere.
Q. In any particular months?
A. No.
Q. You may find them in June?
A. Oh, yes.
Q. And July, and August?
A. (Witness nods.)
Q. How big are they—

The Court: Doctor, you can't just nod your head. You have to speak up so the reporter can hear you.

A. Yes.
Q. How big is a large aquatic bug?
A. Oh, possibly up to three-quarters of an inch long, something like that.
Q. Largest?
A. What?
Q. Is that the largest you know of?
A. Well, approximately.
Q. Well, might they go an inch?
A. Yes.
Q. Might they go an inch and a half?
A. Well, that would be pretty extreme.
Q. I don't care about that, sir. Doctor, let's say an extreme one, would an extreme one go an inch and a half?
[fol. 639] A. Not over an inch and a half.
Q. Well, we have got an inch and a half, anyway, for the limit, haven't we?
A. Yes.
Q. Hard-shelled?
A. Some of them.
Q. They crawl?
A. Do what?

Q. Do they crawl?

A. No, you wouldn't call it crawling. They swim or they fly.

Q. What do they do when they get on land?

A. Well, what I am saying is they don't naturally crawl. They—

Q. I know that, Doctor. Can they crawl?

A. Well, very feebly, let's put it that way.

Q. They do crawl?

A. Yes, very feebly.

Q. What do you mean by feeble?

A. Well, since their normal habit is to swim or to fly, naturally they are not going to do much crawling.

Q. Much, but they do crawl, is that a fair statement?

A. Yes, very feeble, that's right.

Q. Do they call them giant water bugs?

A. Beg pardon?

[fol. 640] Q. Do they call them giant water bugs?

A. Giant water bugs is one type. But it is really a giant water beetle that you are talking of.

Q. Can their bite produce a painful swelling?

A. They don't normally bite.

Q. Sir, Doctor, I am going to read the question back to you and see if you can answer that. Read the question.

(Following question was read by the reporter:)

"Can their bite produce a painful swelling?"

Mr. Leasure: I think I will object. The question assumes that they do bite. That is not established as yet.

The Court: Well, the doctor can answer that.

Mr. Leasure: If he is asked, he can. He hasn't been asked yet.

The Court: I think the question entails, also, the question as to whether or not the bug can bite. The doctor may answer.

A. Well, I can only answer it this way, that if I were to take a giant water bug, or one of the water beetles, which is approximately the same size, into my hand, say, and attempt to crush it, I would probably get a bite, I would think I would.

In other words, I wouldn't normally do such a thing. [fol. 641] It isn't an insect that normally bites a person.

Q. Well, let's forget the normal for the moment, and go into the question of do they bite at times?

A. They could bite under provocation.

Q. You would have to tease them?

Mr. Leasure: Objection.

A. I can't imagine myself teasing them.

Mr. Leasure: I object unless we know what he means by tease.

Mr. Dudnik: You tell me what I mean by tease. I don't know a thing about this subject, and I am just crawling myself, Mr. Leasure.

Mr. Leasure: I can't tell you, and I don't think you don't know yourself. You are just using dramatic language.

Mr. Dudnik: I don't think it is dramatic at all. I am just trying a lawsuit. Read the question. (Last question read by the reporter.)

The Court: I think the Doctor knows what the word tease means. He may answer if he can.

A. I can't imagine anybody teasing an insect, that is what got me.

Q. All right, that answers that for me. I am satisfied. But crushing them might cause a bite?

A. Well, it might, I don't know.

[fol. 642] Q. Didn't you just tell me if you took one in your hand and tried to crush it, it might bite you?

A. I am saying exactly that, nothing more.

Q. Fine, that is what I want to know. Well, you have been asked to assume some things, some hypothetical questions.

I am going to ask you to assume that a man felt a bug under his pant leg, and crushed it hard enough so that it would pop, would that be sufficient to cause it to bite?

A. What does this term pop mean?

Q. Breaks the top, whatever it is, the shell or whatever it is.

Mr. Hadden: Your Honor, I will object to the question. The evidence doesn't show any such thing. It shows a bite and then a squeeze or a pop or whatever it is.

The Court: Of course, my memory is as bad as anybody else's. The testimony was that there was a bite, that there was a squeeze, that there was—the language that was used, it was a pop.

Mr. Hadden: That is exactly the sequence of it, and the question assumes a different sequence.

The Court: Will you rephrase the question, Mr. Dudnik?

[fol. 643] Mr. Dudnik: I will withdraw it, your Honor.

Q. I have a little book here, Doctor. Are you familiar with Herbert Zim of the College of Education, University of Illinois, and Educational Consultant to the U. S. Fish and Wild Life Service?

A. What is the last name?

Q. Zim, Z-i-m. Ever heard of him?

A. Z-i-m? I don't know the gentleman.

Q. Beg pardon?

A. I do not know him.

Q. Well, do you know of a Clarence Cottam, Ph.D., Assistant Director of U. S. Fish and Wild Life?

A. He is a personal friend of mine.

Q. Well, is he an authority?

A. In his field.

Q. Is he an entomologist?

A. I wouldn't say so.

Q. Is he an authority on water bugs?

A. He is an authority on fish and wild life.

Q. Is he an authority on water bugs?

A. No, sir.

Q. I am going to read you a statement and ask you if you agree with it or not.

Mr. Hadden: Objection, your Honor, my reasons for [fol. 644] objecting are apparent, I think.

The Court: May I see counsel?

(Court and counsel conferred at bench.)

The Court: Let's hear the question.

Q. I am going to ask you, Doctor, whether you agree with this statement—

Mr. Leasure: Are we going to a new question?

The Court: I don't think we got into a question. If there was—let me ask, if there is a question are you withdrawing it?

Mr. Dudnik: I am withdrawing it, your Honor.

Q. I am going to ask you, Doctor, whether you agree with this statement:

"Aquatic bugs are found in nearly every pond and stream. A few species are marine, also. All are remarkable for their adaptations to life on or below the surface. Nearly all are predaceous, attacking other insects, snails, small fish, and so forth. In turn these insects are food for larger fish and water birds.

"The water striders, taking advantage of surface tension on water, stay on the surface without breaking through. They skate along with remarkable speed.

"Other water bugs spend most of their time under the [fol. 645] water. Some carry down air on the surface of their bodies and use this for respiration. Other species breathe air that is dissolved in the water.

"In most cases the young resemble the adults and mature after a series of nymphal stages.

"The water-boatmen have an erratic swimming pattern. The back swimmers, as their name indicates, swim on their backs, but can also fly.

"The giant water bugs, sometimes two inches or more in length, prefer quiet water. Since their bite can produce a painful swelling, the amateur collector should exercise caution. When abundant these giant water bugs are harmful in fish hatcheries."

Now, I am merely going to ask you, Doctor, whether you agree or disagree with the statement I just read to you.

Mr. Leasure: Your Honor, may we have the title from which you are reading, and the page?

Mr. Dudnik: Yes. 225 Species in Full Color. Insects. A Guide to Familiar American Insects. Herbert Zim-Clarence Cottam.

Mr. Leasure: What page?

Mr. Dudnik: I was reading from Page 48, and 49.

Mr. Hadden: Your Honor, we should like to preserve the objection we made at the bench and also to the passage [fol. 646] that was read. It refers to bites sustained only by those collecting insects, and there is no evidence of any kind in this situation that anybody was doing any insect collecting.

The Court: Objection overruled, and the doctor may answer.

A. Will you read the section about the bites or stings again?

Q. Yes, Doctor. "The giant water bugs, sometimes two inches or more in length, prefer quiet water. Since their bite can produce a painful swelling, the amateur collector should exercise caution."

And the last sentence is, "When abundant, these giant water bugs are harmful in fish hatcheries."

A. I agree with that perfectly, and what you say about using caution simply bears out what I already said to you about if you clutch them in your hand.

Q. Then, Doctor, do you say that you agree with this statement in toto, in full, as I read it?

A. That's right. It is a generally good statement.

Q. Now, Doctor, that type of bug is the one I asked you about when I first started to examine you called—it is an aquatic bug, is that right?

I am going to show you a picture of one of them, and [fol. 647] it says here, I believe, 2 and 2/10 inches in length; is that right?

A. Yes, that's about right. That is a mighty big one.

Q. Mighty big one. And in all your experience you have never seen such a big one, have you, Doctor?

A. That's about the limit you could expect, I would say.

Q. We go now better than a half inch more than your other limit, don't we, Doctor, than your first limit?

A. Well, possibly so.

Q. Beg pardon?

A. I said that one was large, that size was about it.

Q. Doctor, you I believe said that the largest you concede was about an inch and a half, is that right?

A. That is a good fair estimate.

Q. You now concede that they can be over two inches long?

A. No, sir. I simply concede that he says that bug is two and 2 [illegible] inches long.

Q. You do concede that, but you won't concede—

A. I concede that that photograph is labeled two and two-tenths inches.

Q. But you won't concede that there are any that long, Doctor, I take it, is that right, Doctor?

A. That's right.

Q. Now, you say in answer to Mr. Hadden's question, I believe you said there are only two insects, and they are [fol. 648] both mosquitoes, that are the only risk presented in this area?

The Court: Doctor, you will have to answer.

A. I said—

The Court: I am merely saying don't nod your head because the reporter must hear your answer.

Q. Is your answer yes?

A. The answer is yes, that there are only two species that might breed and be common in that area.

Q. You are now referring to species that are bred or born there, right, isn't that so?

A. Well, that is what you asked me.

Q. Of course, there are other species which could be brought in here which are not necessarily bred here, isn't that so?

A. Other species of mosquitoes?

Q. No. Other species of insects that would be a risk in this area.

Mr. Leasure: I object now. You are talking about two different things. The witness has been talking about mosquitoes. I don't know what Mr. Dudnik is talking about.

Mr. Dudnik: I am trying to find out—

The Court: I do understand Mr. Dudnik did say other [fol. 649] species and I think when you refer to species you probably mean species of what you have been talking about. I think Mr. Dudnik means other bugs or insects.

Q. Are there other bugs or types of insects that are not bred here but that could be brought in one way or another that would breed—

A. Mosquitoes?

Q. No. Insects, sir. We were stopped on mosquitoes. Now we are talking about insects, besides mosquitoes.

A. I don't understand your question. You said brought in there, what do you mean? You mean they flew in from the countryside or what?

Q. Say on a freight car with some Southern freight.

A. Well, there probably would be cases where the Inspection Service is such that they wouldn't pick them up. There might be.

Mr. Dudnik: I ask that the answer go out, your Honor.

The Court: The answer was not responsive, Doctor. Try to make your answer responsive to the question.

Mr. Dudnik: Read the question.

A. Read the question again to me.

Mr. Leasure: If your Honor please, he was asked if [fol. 650] certain species of something still undesignated could have come in here on a freight car.

The Court: The Doctor said something about inspection, and the answer is yes or no.

Mr. Leasure: Oh, no, he is entitled to explain his answer, please, your Honor.

Mr. Dudnik: The Court has ruled, sir.

The Court: Ask the question again.

Mr. Dudnik: I would like it read. I would like it read.

(Record was read by the reporter.)

Mr. Dudnik: Your Honor, that is the part, the inspection service, that I ask go out.

The Court: I don't think we have a complete enough answer to the question. I think perhaps, the objection was raised and the Doctor wasn't given a chance to complete. Had you completed the answer with that statement?

A. Well, I was uncertain as to what exactly he meant.

Q. Do you now know what I mean, Doctor?

A. I would say highly improbable.

Q. Why, Doctor?

A. Well, they just aren't transported about that way with the type of inspection service that the Federal Government [fol. 651] has. It is highly improbable that they would be introduced.

Q. Because you mean of proper inspection?

A. It is highly improbable they would be introduced.

Q. Now, were you ever with the Inspection Service?

A. Yes, sir.

Q. And when was that?

A. In my capacity as head of the Entomology Department in Delaware, I also had charge of the inspection.

Q. What do you mean by having charge of inspection, Doctor, in your service?

A. Administratively, I was in charge of the inspectors that did the inspecting.

Q. Did you inspect cars, sir?

A. I didn't have to. The inspectors did.

Q. Doctor, please, I asked you whether you inspected cars?

A. I did not.

Q. And where was that service that you performed?

A. In the state of Delaware.

Q. Delaware?

A. That's right.

Q. For what railroad?

A. The railroads that run through there. The Pennsylvania and the B & O.

Q. Thousands and thousands of cars?

A. That's right.

[fol. 652] Q. And there are hundreds and hundreds of cars coming into Ohio from the South, and other parts of the country, isn't that so?

A. That's right.

Q. Are you familiar with the inspection service in this area, in '54?

A. Well, I would say to that that it is the same type of inspection service they give in every state.

Mr. Dudnik: I ask that that answer be stricken and the jury be asked to disregard it. He is either familiar or he is not.

The Court: The answer will go out.

Mr. Leasure: If your Honor please—

The Court: The question calls for a specific answer, it deals with Ohio. The question at least deals with the state of Ohio. The question asked was are you familiar with the inspection service in the State of Ohio, as best I remember the question.

Mr. Leasure: But there still has been no showing that there is any difference between Delaware and Ohio.

Mr. Dudnik: I am not showing anything. I asked him.

The Court: He merely asked the question are you [fol. 653] familiar with the inspection service in the state of Ohio. He either was or wasn't.

A. If you limit it that way, I have no understanding of it in Ohio.

Q. Not at all, Doctor?

A. That's right.

Q. So that you don't know how they inspect foreign cars, in what manner they do it, in Ohio, do you, Doctor, being unfamiliar?

A. Well, you can put it that way if you want to.

Q. I don't want to do anything, Doctor. I am asking you some questions.

Mr. Leasure: I think you do, Mr. Dudnik, and this is highly argumentative.

Mr. Dudnik: Let the witness answer. I will wait, I will wait until you tell him.

Mr. Leasure: Why don't you just be fair with the witness? It is highly argumentative.

The Court: We have been very calm here and we are not going to let any tempers flare up and we are going to conduct this trial according to the rules of evidence and procedure. The Court will rule on objections that are raised. Now, if counsel for the plaintiff wants to rephrase a question, the question may be asked. If counsel has an objec- [fol. 654] tion and raises the objection the Court will rule on the objection.

Mr. Dudnik: May I have the question read?

Mr. Leasure: I am objecting to this question.

The Court: Let's hear the question.

(Following was read by the reporter:)

"Question: So that you don't know how they inspect foreign cars, in what manner they do it, in Ohio, do you, Doctor, being unfamiliar?"

"Answer: Well, you can put it that way if you want to."

Mr. Dudnik: Is the question I asked a proper one, your Honor?

The Court: The question was asked and answered and it is a proper question, and it is the witness' answer.

Mr. Leasure: If your Honor please, it is the last part after the answer that I am objecting to.

Mr. Dudnik: Whatever it is I will withdraw it.

The Court: You are objecting to some statement made by counsel.

[fol. 655] Mr. Leasure: I am doing that, and I think there was a question on the end of it, as I heard it. Perhaps the reporter didn't hear it.

The Court: I think Mr. Dudnik has just stated he is withdrawing it.

Mr. Dudnik: Whatever it is, I will withdraw it. I don't remember what I said.

Q. So now I go back to the other question, Doctor, then, is it possible for certain other insects of species different than mosquitoes, not bred in this area, to be brought in on freight from other areas, that would be a risk as far as a bite or infection is concerned?

Mr. Leasure: Just a moment. I am objecting as to possibilities. We are dealing with probabilities only here. Anything is possible, I assume. It is argumentative certainly.

Mr. Dudnik: Your Honor, may I have the same time to answer him? Yesterday when this gentleman was cross-examining Dr. Ippolito, and the day before, he asked question after question on possible. There was no objection on my part, because on cross-examination it is proper, your Honor.

The Court: All right. I have heard both sides. The objection is overruled. The doctor will answer the question.

[fol. 656] A. Read the question.

(Last question read by the reporter.)

A. Yes.

Q. And that would be large insects and small insects, could it not?

Mr. Leasure: I object, your Honor, to the possibility.

The Court: He may answer.

A. Yes.

Q. And the same would be true from other areas, whether it be south or west or east of this area?

Mr. Leasure: Objection.

Q. Isn't that so, Doctor?

The Court: He may answer.

A. What other areas?

Q. We talked about the south, now I am talking about—

A. You are talking about others?

Q. Yes.

A. Yes, the answer is yes.

Q. Doctor, were you told the kind of freight that is switched in the area which you walked around the other day?

Mr. Leasure: I think I will object here.

A. Yes.

Mr. Leasure: Your Honor, apparently he is going into [fol. 657] a field which the Court knows has been stricken out. We are objecting not only as to the ground of possibility, but also relevancy.

The Court: The area that counsel agreed upon that the jury might see? Is that what you are speaking of?

Mr. Leasure: No, I am speaking of the specifications that have been stricken, your Honor, and no longer a subject of this lawsuit. I am objecting on the grounds of irrelevancy.

(Court and counsel conferred at the bench.)

Mr. Leasure: Is there a ruling on my objection, your Honor, for the record?

The Court: Yes, I am overruling the objection, and the Doctor may answer. I know I lost the question and the jury may have lost the question, so will the reporter read the last question?

(Last question read by the reporter.)

A. No.

Q. Doctor, if I am going out of your field, I don't mean to, and I am going to ask you a couple of questions. If you don't feel qualified to answer, believe me, I mean to make no reflection.

Mr. Hadden asked you to assume several things, one of which was a ditch or area with stagnant water, and dead, [fol. 658] decayed pigeons and rats; as an expert would you term that as an unclean area?

Mr. Leasure: I think I will object to that, your Honor; this floor is unclean, you could call it that, it hasn't been swept since last night probably.

Mr. Dudnik: Apparently Mr. Leasure is uncomfortable, he keeps on interrupting me.

Mr. Leasure: I just want fair questions put to the witness, that is all.

Mr. Dudnik: Your Honor, this is the basis for another question.

The Court: The Court is going to permit the witness to answer the question.

Mr. Dudnik: Can you answer that?

The Witness: Read that question.

(Last question read by the reporter.)

A. In so far as the pigeons and rats are concerned, yes.

Q. How about the stagnant water they are laying in?

A. No.

Q. You wouldn't call that unclean?

A. No, sir.

Q. But you would say that the dead animals are unclean?

A. Yes, sir.

Q. Now, as an expert can you tell me if an insect crawled [fol. 659] over any of those dead vermin that we talked about, would it carry some of the uncleanliness on itself away from those dead rats and pigeons?

Mr. Leasure: I hate to keep popping up, your Honor, but I am forced to, unless the word "unclean" and "uncleanliness" is defined here. Certainly it is a totally and grossly unfair question, because all of us may have different ideas of what is unclean.

Mr. Dudnik: Your Honor, I object to the speeches.

Mr. Leasure: Certainly it is unfair to the witness to require him to answer such a generalized question.

The Court: Counsel has raised an objection and the Court will rule on it. The objection is overruled. The Doctor will answer.

A. I answered.

The Court: This is another question, Doctor.

Mr. Dudnik: Read the question.

(Last question was read by the reporter.)

A. It could.

Q. And if an insect—if you can answer this as an expert you tell me—and if an insect which had the ability to bite [fol. 660] or sting, carrying some of that uncleanliness which it had picked up in that area going over the rats and pigeons, as I have asked you about, could it transmit that uncleanliness to a person it stung?

Mr. Leasure: Objection.

The Court: Objection overruled.

A. That is a difficult thing for me to answer technically.

Q. It is more difficult to answer than the other question before that?

A. That's right, that's right.

Q. Do you care to answer it?

A. I would be perfectly happy to answer it.

Q. Well, can you answer it?

A. Yes.

Q. Will you answer it?

A. If the insects were scavengers which were working on these dead bodies, and that is the only kind of insects attracted to them, they could carry some of this away.

Q. How about an insect—first, tell me what a scavenger is?

A. Well, a scavenger, there are several scavenger species, in fact a good many of them. But they are a type of beetles which are called burying beetles or carrying beetles, road beetles, and they make their living and live on dead animals, and that is their only interest whatsoever. They don't sting [fol. 661] and they don't bite.

Q. Do they bite anyone?

A. No.

Q. Then I don't think you understand—maybe you do and I don't understand you—my last question referring to an insect bite or sting, sir, would you like it read to you again?

A. Yes, but I don't get the point, because an insect that would sting wouldn't be on the dead animal.

Q. Do you now say there is no insect known to science that bites or stings that would crawl across a dead animal?

A. I would say that would be highly improbable.

Q. Is it possible?

Mr. Leasure: I object, your Honor.

The Court: He may answer.

A. Anything is possible.

Q. I am not taking about anything. I am talking about is that possible?

Mr. Leasure: Objection.

The Court: He may answer.

A. It could be.

Mr. Dudnik: I have no more questions, Doctor. Thank you very much.

[fol. 662] Redirect examination of Dr. Louis A. Stearns.

By Mr. Hadden:

Q. Doctor, I have one or two brief questions and I hope we can get through with you today so you can go home, as I know you are anxious to do.

The giant water bug that has been referred to, Dr. Stearns, in this book, what can you tell us about the habits of the giant water bug, and be as brief as you can, please.

A. Well, the giant water bug is a bug. It isn't a beetle, which means it doesn't have these high wing covers. It breeds in aquatic places, running stream of water, lays it eggs there. The young and the nymphs are predaceous. They live on other insects and small animal life in the water. When they pass through the last nymphal stage and become adults which are very much like the young, they fly about in the same area, and the only reason that you would find them in a municipal situation such as this, they are attracted to electric lights at night.

Q. Doctor, is it reasonable or logical to assume that a giant water bug such as you discussed would be likely to be attracted to human beings for any reason whatsoever?

A. No, indeed. They are predaceous.

Q. Doctor, recalling the hypothetical question which I asked you before Mr. Dudnik questioned you, as to an in- [fol. 663] sect going up the man's pant leg, do you have that question in mind, sir?

A. Yes.

Q. Would you regard it as likely or probable that a giant water bug would behave in the fashion supposed in that question?

A. I wouldn't say it is highly improbable. I would say it is almost impossible.

Q. You mentioned your experience with the Federal Insect Inspection Service, sir?

A. That's right.

Q. Do you know what the system of inspection is nation-wide, are you familiar with that through your experience?

A. With what?

Q. Are you familiar with nation-wide inspection system?

A. Yes.

Q. And you know how it is carried out?

A. That's right.

Q. What is the fact, sir, whether or not the system you followed is the same nation-wide?

A. As far as I know, federally, it is country-wide.

Q. And you have no reason to suppose that it is any different in Ohio than anywhere else?

Mr. Dudnik: Objection to that, your Honor.

Mr. Hadden: You went into it, Mr. Dudnik.

[fol. 664] Mr. Dudnik: Are you sure?

The Court: You are asking him to suppose. The objection will be sustained.

Mr. Hadden: I have no further questions, Doctor.

The Court: You may step down, Doctor.

The Court: Ladies and gentlemen of the jury, upon the adjournment of Court by the bailiff we will resume once more tomorrow morning at 9:15, with the admonition that you do not talk about this case with anyone, not even amongst yourselves.

(Thereupon an adjournment was taken to 9:15 a.m., Friday, June 19, 1959, at which time the following proceedings were had:)

[fol. 665] Friday morning session, 9:15 a.m.,
June 19, 1959

Thereupon the Defendant, further to maintain the issues on his part to be maintained, called as a witness Encell C. Richardson, who, being first duly sworn, was examined and testified as follows:

Direct examination of Encell C. Richardson.

By Mr. Leasure:

Q. Will you state your name, please?

A. Encell C. Richardson.

Q. Where do you live?

A. 18911 Scottsdale Boulevard, Shaker Heights.

Q. And what is your occupation?

A. I am engineer and sewer designer for the City of Cleveland.

Q. How long have you been with the Engineering Department of the City of Cleveland?

A. 40 years.

Q. Pursuant to a subpoena have you appeared here this morning and brought with you certain records of your department?

A. Yes, sir.

Q. I will refer now to Defendant's Exhibit J, and ask you if that is one of the records that you brought with you?

A. It is.

Q. Will you tell us what it is?

[fol. 666] A. It is a map of the intercepting sewers in the Cuyahoga River Valley.

Q. Does it show the locations of the sewers that enter and flow into the Cuyahoga River?

A. It does.

Q. As of what date?

A. As of 1955.

Q. I see down here in the lower right-hand corner the notation "Revised November 15, 1955"?

A. Yes, sir.

Q. So that as I understand it—

A. The map was made in 1945.

Q. Originally made in 1945?

A. That's right.

Q. And brought up then to date to November of 1955? Is that correct?

A. That's correct.

Q. So, then, this map shows the conditions existing as of November 15, 1955, in so far as sewers and sewer connections are concerned?

A. That is correct.

Q. Now, what is the fact, Mr. Richardson, as to whether in August of 1954 there was raw sewage, untreated sewage, being dumped into the Cuyahoga River?

A. There was—all of the Cuyahoga River Valley within [fol. 667] the limits of the City of Cleveland, and beyond the City with the exception of two very small areas—

Q. Can you keep your voice up a little bit? I think the folks are having a little bit of trouble hearing you.

A. With the exception of an area around the Valley View Homes Housing Project. That is in the neighborhood of West Third Street and Mary Avenue, and the Parcel Post Building at the lakefront. With the exception of those two areas, all the sewage and industrial waste went directly into the Cuyahoga River.

Q. Without being treated?

A. Yes, sir.

Q. Now, by sewage you mean material that ordinarily flows through the sanitary sewers, that is coming from people's homes, toilets, and so forth?

A. The sewers in this area are combined sewers. They carry storm and sanitary both.

Q. Storm and sanitary?

A. Yes.

Mr. Dudnik: Storm and—

Mr. Leasure: Storm and sanitary, I think he said.

Q. So that the sewers that empty in the Cuyahoga River carry both drainage water and sewage?

A. That's correct.

[fol. 668] Q. Now, this is a rather lengthy map and I don't want to get bogged down into a lot of details here, because I don't understand it myself.

Will you tell us if there is something on the map, or some designation on the map that shows the locations where raw sewage was dumped into the Cuyahoga River as of November of 1955?

A. Yes, sir. All those black dots on the map along the river.

Q. Let's see if we can see what you mean. This, for example?

A. That's right.

Q. And this, for example?

A. That's right.

Q. And so on, clear to the top?

A. In addition to that creeks went right into the river.

Mr. Dudnik: Creeks went into the river?

A. Yes.

Q. What do you mean by that, how is that significant here?

A. A lot of sewers are connected with the creeks that run into the river.

Q. In other words, some sewers connected to the creeks, the creeks go into the river?

A. Yes.

Q. And those sewer outlets are not shown on this map?
[fol. 669] A. That's right.

Q. Now, you mentioned Valley View Homes. Does that show on this part of the map that I have here?

A. Yes.

Q. Where is that?

A. This area.

Q. I will hold my finger there.

A. No, here. These houses in here.

Q. All right. Take the stand again, Mr. Richardson. Do I understand then that when you referred to Valley View Homes you were referring to this area in here generally?

A. That's right.

Q. May I draw—I will use a red pencil if I have one—generally there?

A. That's right.

Q. You say that area was connected up with the sewer system that did not empty into the Cuyahoga River?

A. Yes, sir. We built a pumping station there.

Mr. Dudnik: Built a what?

A. Pumping station.

Q. Then you said something about the Post Office as not going into the river, that is, sewage from there not going into the river, did I understand you correctly?

A. Yes, sir. That is at the lakefront.

Q. I see a building marked Parcel Post Building; is that [fol. 670] what you are referring to here?

A. Yes, sir.

Q. All right, I will draw a red circle around there. Now, with the exception of those two areas, do I understand you to say that in August of 1954 all of the sewage and industrial waste from the Cuyahoga Valley were going into the Cuyahoga River?

A. That's correct.

Q. The sewage untreated?

A. Yes, sir.

Q. Now, just one other thing here.

Mr. Dudnik: Do you want me to hold it up?

Mr. Leasure: If you will just hold it up on the sides it will help.

Q. Mr. Richardson, will you follow my finger here, and I want to get up to the Columbus Road, Carter Road area here. I see a road marked Columbus Road here, Canal Road, and I see Carter Road. Do I have my finger about the right place?

A. Yes, sir.

Q. I think I will put a red circle around there.

Now, this map as I understand it, the top is north?

A. That's right.

Q. The bottom is south, and the shaded area here is the Cuyahoga River, is that correct?

[fol. 671] A. Yes, sir.

Q. —that I have my finger on here?

A. Yes.

Q. And in what direction is the flow of the Cuyahoga River as shown on the map?

A. To the north.

Q. To the north, all right. Then for purposes of clarity, Mr. Richardson, is it a fact that all of the raw sewage that was dumped into the Cuyahoga River in the areas shown on this map flowed to the north, and then dumped into Lake Erie?

A. That's right.

Q. Now, you were kind enough to bring one other map here which was marked Defendant's Exhibit K, and will you tell us what that is?

(Defendant's Exhibits J and K were marked for identification by the reporter.)

A. That is a reduction of the previous map. That shows the areas in color that are connected to the Cleveland sewage treatment works and no longer go into the Cuyahoga River.

Q. Now, I notice that you have different colors and you have dates shown with each colored area, is that correct?

A. Yes, sir.

Q. For example, I notice the green area down here bearing a date of September 16, 1954; what does that indicate?

[fol. 672] A. That is the date when we accepted the pumping station from a contractor that lifted the sewage from that area into the city sewer system.

Q. Does it mean that as of that date the sewage from this area stopped being dumped into the Cuyahoga River and started being pumped away?

A. That's right.

Q. To a sewage treatment works?

A. Yes, sir.

Q. Now, I see the yellow area here is bearing the date of 1958. Is the same true as to that?

A. Yes, sir, that is the Harshaw Chemical Company.

Q. I see this blue area bearing a date of 1942; is that the Valley View area that you showed us on this large map?

A. Yes, sir.

Q. The orange area here bearing a date of 1957, does that indicate that in 1957 the raw sewage from that area was stopped being dumped into the Cuyahoga River and started into other sewers?

A. Yes, sir.

Q. The green area here, 1959, is the same true as to that?

A. Yes, sir.

Q. The blue area, 1956, the same is true as to that, as of that date?

A. Yes, sir.

[fol. 673] Q. And the red area, 1953, is that the Post Office Building that you testified about before?

A. Yes, sir.

Q. Now, I notice here on this small map something that appears to be the Public Square, and this green area I am pointing to is just adjacent to that, it runs from there generally down to the Cuyahoga River; can you tell us what buildings in this general area here near the Public Square dump their raw sewage into the Cuyahoga River up to 1959?

A. The portion, the major portion of the Cleveland Union Terminal Building on the Public Square, and the Midland Building, Republic Building on Prospect Avenue, and the buildings along lower Superior Avenue, and the Sherwin-Williams Paint Company on Canal Road, and the Cleveland Illuminating Company Building on Canal Road.

Q. And other buildings generally in that area?

A. And the B & O Railroad station on Canal Road.

Q. Did the line carrying that sewage enter the Cuyahoga River at the point where I have my pencil here?

A. Yes, sir.

Q. As shown by the circle?

A. Yes, sir, that is Superior Street.

Q. Do you have any idea, Mr. Richardson, as to the volume of raw and untreated sewage that back in 1954 was being dumped into the Cuyahoga River every day?

[fol. 674] A. That is difficult to determine, sir.

Q. Can you give us any estimate on it?

A. It is a large amount.

Mr. Dudnik: Objection and ask that that answer go out.

Q. Can you give us any estimate?

Mr. Dudnik: Just a moment.

The Court: The last answer will go out.

Q. Can you give us any estimate on it?

A. No, sir.

Mr. Leasure: You may cross-examine.

Cross examination of Encell C. Richardson.

By Mr. Dudnik:

Q. Mr. Richardson, you have been the engineer of sewer design of the City of Cleveland for 40 years?

A. Yes, sir.

Q. This map that you brought doesn't state which sewers are blocked and which sewers are broken, does it?

A. As far as I know, none of them are blocked or broken.

Q. As far as you know?

A. Yes.

Q. Well, how would you know whether any of them are blocked?

A. We would receive complaints about it if there were.

[fol. 675] Q. Supposing there was a sewer and pipes leading from a sewer in the Columbus Road bridge area, this area where Mr. Leasure put a little circle around it, supposing that were blocked up and backing up and causing

a ditch alongside the tracks to be filled with water, would you know about it?

A. I might not know it personally, no, sir.

Q. And if it wasn't reported nobody in your department would know about it?

A. They go to the Sewer Maintenance Department.

Q. But if it wasn't reported nobody would know about it, would they?

A. No, sir.

Q. You do not know now whether a sewer and pipes leading from a sewer within a few feet of the Columbus Road bridge was blocked up 10 days ago, do you?

A. No, sir.

Q. You never heard of it?

A. No, sir.

Q. Now, you have been with the City of Cleveland for 40 years, and you have watched things change pretty much, haven't you?

A. Yes, sir.

Q. No matter what type of disposal system that industry uses, it has to pass I presume the Health Department of the City of Cleveland?

[fol. 676] A. No, sir, the State Board of Health.

Q. It has to pass the State Board of Health. So that before any industry was permitted to have its sewage dumped into the Cuyahoga River, it had to be approved by the State Board of Health, did it not?

A. You have to have a permit from the State Board of Health.

Q. Which means it has to be approved by the State Board of Health, doesn't it, sir?

A. You have to have a permit to continue it, yes, sir.

Q. All these things, the sewage disposal operations, are controlled by the Board of Health, are they not?

A. In the City of Cleveland.

Q. Beg pardon?

A. In the City of Cleveland, yes.

Q. And if it is a menace to health it wouldn't be permitted, sir?

Mr. Leasure: I think I will object unless the word "it" is identified.

Q. If the disposal of sewage that you described up until 1955 into the Cuyahoga River was a menace to health, it wouldn't be permitted, would it?

Mr. Leasure: I will object to that, your Honor.

The Court: What is the objection?

Mr. Leasure: The objection is, first, that it calls for a [fol. 677] conclusion, and secondly he started out talking about the sewer disposal system, which would indicate perhaps septic tanks or something like that. And now the question relates, as I understand it, to any dumping of sewage, untreated or otherwise.

The Court: May I hear the question?

(Question read by the reporter.)

Mr. Leasure: There is another ground. He is not shown to be qualified on that particular subject.

The Court: May I have the question again, please?

(Question again read by the reporter.)

Mr. Dudnik: If I may be heard for one moment, your Honor. This gentleman has already answered with regard to certain permits from the Health Department. It is obviously intended to establish through him that a condition existed which might produce the condition complained of in this case. And so the witness gave testimony to the effect that there was sewage, treated and untreated, dumped into the Cuyahoga River.

Now, having said that and having talked about permission of the Health Department, before certain things [fol. 678] can be done, I think I have the right to develop this thing further.

The Court: He may answer.

A. It would be permitted and has been permitted. The question of pollution of the Cuyahoga River is under the control of the Stream Pollution Board of the State of Ohio. They issue permits to continue the pollution.

Q. In other words, what Board did you say, sir?

A. The Stream Pollution Board.

Q. In other words, the Stream Pollution Board of the State of Ohio has to permit that operation before it can be done, is that right?

A. Correct.

Q. And that's the way to operate the city, isn't it?

A. They also permit the City of Cleveland to do it.

Q. Sure, it is done with approval, isn't it?

A. Yes, sir.

Q. And in other areas of Cleveland, sewage is disposed of in another manner, isn't it, whatever that manner may be, is that true?

A. I presume so.

Q. And that is done with approval, isn't it, sir?

A. Yes, sir.

Q. Now, this area which is shown in this map which includes the flats area—does it not?

[fol. 679] A. Yes.

Q. —you know that thousands of people work in that area, do they not?

A. That's right.

Q. They go to their work every day and back, do they not?

A. Yes, sir.

Q. In the very area that you talked about where this sewage is flowed, what was the word, dumped into the river, isn't that so?

A. Yes.

Mr. Dudnik: Thank you, Mr. Richardson.

Redirect examination of Encell C. Richardson.

By Mr. Leasure:

Q. Just a few more questions, Mr. Richardson. Let's go back to Defendant's Exhibit K.

You have already told us that that shows the areas that have been hooked into a sewer system.

Will you tell us when an area such as the one shown here in these different colors is connected, what then happens to the sewage, the raw sewage that comes from that area?

A. It goes to a pumping station and we pump it out of the Cuyahoga River Valley and connect it to a sewer that runs to the treatment plant.

Q. Then is this a fact, then, that in each of these colored [fol. 680] areas here, as of the date shown, the raw sewage instead of being any longer dumped into the Cuyahoga River untreated, goes into a sewer pipe system that pumps it out of the Valley and to a sewage treatment plant, is that correct?

A. That's correct, that's right.

Q. So that neither raw nor treated sewage gets into the Cuyahoga River any longer?

A. That's right.

Q. Now, does this map also show not only the areas where connections have been made to a pumping station, and a sewage treatment plant, but does it also show areas where you propose or perhaps presently have in process similar developments?

Mr. Dudnik: Objection.

A. It does.

The Court: He may answer.

Q. In time, Mr. Richardson, what will be the fact as to the raw sewage that arises in the Cuyahoga Valley, ultimately will it all be not dumped into the river and put into sewage treatment plants?

A. It will all be pumped out of the Cuyahoga River Valley except certain industrial wastes that are detrimental to the sewers themselves. Those will have to be treated individually by the industry.

Q. By industrial wastes you mean chemicals of some kind?

A. Yes.

[fol. 681] Q. Or matters of that kind which would hurt your sewage treatment plant?

A. Yes, sir.

Q. Then do I understand you that in time there will be no longer any raw sewage—

A. That's correct.

Q. —dumped into the Cuyahoga River?

A. That's correct.

Q. Can you tell us why such a program has been and is being undertaken, does it relate to health in any way?

A. It is being done by orders of the Stream Pollution Board of the State of Ohio.

Q. By orders of the Stream Pollution Board of the State of Ohio?

A. Yes, sir.

Q. Can you tell us approximately when the Stream Pollution Board of the State of Ohio first issued any order on this general subject pertaining to raw sewage in the Cuyahoga River?

A. (No answer.)

Q. Do you want to look at this map, will that help you?

A. Well, the Stream Pollution Board was created at a later date. Originally the orders came directly from the State Board of Health.

Q. I see.

[fol. 682] A. Those were the first orders.

Q. When did the first orders come from the State Board of Health?

A. Back in the 1930's.

Q. 1930's, is that when you first started planning on doing something about this?

A. Yes.

Q. And when did the State Pollution Board come into existence?

A. I think it was about 1940's.

Q. 1940's?

A. Yes.

Q. Then this program has continued under their direction and order?

A. Yes, sir, that's right.

Q. Do you know from your position in the sewer department of the City of Cleveland, that is, the engineering department having to do with sewers, whether the State Pollution Board has granted permits or whatever it is they grant—well, let me ask you this—I don't want to assume anything.

You said something in response to Mr. Dudnik's questions about some kind of permits being issued, did I understand you correctly, by the State Pollution Board?

A. Yes, sir.

Q. What kind of permits are those, what name do they have?

[fol. 683] A. It is a permit to continue pollution of the Cuyahoga River. It is an annual permit issued every year.

Q. To continue with pollution?

Mr. Dudnik: To continue?

A. Yes, sir.

Q. What does the word pollution mean?

A. The permit also describes certain improvements that have to be made within the year.

Q. Within the year?

A. In consummation of the general plan.

Q. In consummation of the general plan?

A. Yes.

Q. The general plan to remove all pollution in time?

A. Yes, sir.

Q. Is such a permit issued to the City of Cleveland each year?

A. Yes, sir.

Q. And is such a permit issued to each industry who may have a sewer dumping into the river?

A. Yes, sir.

Q. So is it fair to say that the State of Ohio is keeping a continuing check on this situation?

Mr. Dudnik: It is all leading, your Honor. Objection to the question.

Mr. Leasure: Well, strike it.

[fol. 684] Q. Do you have any estimate you can give us, Mr. Richardson, as to when this entire plan will be completed whereby sewage will no longer be dumped into the Cuyahoga River?

Mr. Dudnik: There is an objection, your Honor, because it is immaterial to the issues in this case.

Mr. Leasure: I am not so sure of that.

The Court: He may answer if he knows.

A. It depends on financing. About five million dollars worth of work to be done yet. As soon as the money is made available it will be completed.

Q. Does the fact, Mr. Richardson, that the State Pollution Board issues a permit to dump raw sewage into the Cuyahoga River, or to continue to dump it, does that fact mean that it is healthful?

Mr. Dudnik: Objection, your Honor.

Q. —to dump raw sewage into the Cuyahoga River?

Mr. Dudnik: Objection.

The Court: Objection sustained.

Mr. Leasure: It is just the reverse of the other question that was asked by Mr. Dudnik.

The Court: Well, apparently there was no objection at that time.

[fol. 685] Mr. Leasure: I certainly did object, your Honor.

Mr. Dudnik: Your Honor, I withdraw my objection.

Mr. Leasure: Will you read the question?

Mr. Dudnik: It is not the reverse of my question, your Honor. It is not the reverse. And this is direct and not cross. But I withdraw the objection.

(Question was read by the reporter.)

A. The answer is no.

Mr. Leasure: Thank you. That is all.

The Court: Anything further of this witness?

Mr. Dudnik: Yes, your Honor.

Recross examination of Encell C. Richardson.

By Mr. Dudnik:

Q. Sewage of any kind is not healthful, is it?

A. Certainly not.

Q. And in city life, the Government has to contend with sewage, doesn't it?

A. Yes, sir.

[fol. 686] Q. It is part of our everyday life, isn't it, sewage?

A. Yes, sir.

Q. And up until 1955 with the appropriate studies I suppose having been made, sewage was permitted to be dumped into the Cuyahoga River, isn't that so, sir?

A. No, sir. They corrected part of it in 1942.

Q. Beg pardon?

A. They corrected part of it in 1942.

Q. Yes, sure, because as we progress, as we get more scientific, we make improvements, do we not?

A. Yes.

Q. But it was permitted up until 1954, wasn't it, because I understand you to say that it had to come on orders of the Stream Pollution Board of the State of Ohio; so it was permitted, wasn't it, sir?

A. Yes.

Q. And it is still being permitted, sir, isn't it?

A. Under certain conditions.

Q. It is still being permitted, isn't it, sir?

A. (No response.)

Q. Can you answer that yes or no?

A. No, I can't answer it yes or no.

Q. All right, I will ask you another question. Are we still dumping sewage into the Cuyahoga River from some places?

A. Certainly.

[fol. 687] Q. And that is with the approval of the Pollution Board of the State of Ohio, isn't that so?

A. That's right.

Q. And it has been done for the 40 years that you have been connected with the City of Cleveland, hasn't it?

A. That's right.

Q. If there was a better way 40 years ago it would have been improved 40 years ago, I take it?

A. It would have been corrected years ago if they had finances to do it with.

Q. I see. And still it went on this way and now they are cutting it down here and there, are they not?

A. That's right.

Q. And people are walking around that area and working in that area all the time, are they not?

A. That's right.

Mr. Dudnik: Thank you, Mr. Richardson.

Recross examination of Encell C. Richardson.

By Mr. Leasure:

Q. Just one last question, Mr. Richardson. Is the City of Cleveland being permitted to continue to dump raw sewage in the Cuyahoga River on condition that they complete this program which in time will remove all such dumping?

A. That's right.

[fol. 688] Mr. Leasure: That is all.

Further cross examination of Encel C. Richardson.

By Mr. Dudnik:

Q. And that is because the City of Cleveland in its progress as a great industrial city is continually striving to improve conditions, isn't that so?

Mr. Leasure: Objection.

The Court: He may answer if he knows.

A. Yes.

Q. And isn't it because part of this program is due to the fact that they want to clean up Lake Erie?

A. That's right.

Q. For recreation purposes?

A. And health purposes.

Q. Because for all these years the sewage which was dumped into the Cuyahoga River went into Lake Erie, didn't it?

A. Yes, sir.

Q. And it went all along the north of the City of Cleveland, didn't it, sir?

A. No, I wouldn't say all along.

Q. How far?

A. It goes east after it gets out of the Cuyahoga River.

Q. Then it went all along the east side of the City of [fol. 689] Cleveland?

A. Yes.

Q. That sewage which you speak of, right?

A. That's right.

Q. How far, all the way past Euclid Beach, I suppose?
A. Yes.
Q. Is that a fair statement?
A. Well, probably as far as Gordon Park.
Q. Gordon Park. And that has been continuing for 40 years, hasn't it?
A. That's right.

Mr. Dudnik: Thank you, Mr. Richardson. Thank you very much.

Mr. Leasure: Thank you, Mr. Richardson. That is all.

The Court: You may step down.

[fol. 690] Thereupon, the Defendant, further to maintain the issues on its part to be maintained, called as a witness DR. JOHN H. DAVIS, who, being first duly sworn, was examined and testified as follows:

Direct examination of Dr. John H. Davis.

By Mr. Leasure:

Q. Will you tell us your name, please?
A. Doctor John H. Davis.
Q. Where do you live, Doctor Davis?
A. 2719 Wicklow Road, Cleveland 20.
Q. Are you a duly licensed physician and surgeon in the State of Ohio?
A. Yes, sir.
Q. Doctor, will you tell us briefly concerning your education and training in the field of medicine?
A. I graduated from medical school in 1948. I had most of my post-graduate training at University Hospitals in Cleveland. Diplomate of the American Board of Surgery, and presently on the staff of the University, and of the University Hospitals.
Q. Where is your office located, Doctor Davis?
A. In University Hospitals.
Q. On Adelbert Road in Cleveland?
A. Yes, sir.
[fol. 691] Q. Doctor, do you hold any titles there at the hospital?

A. I am Director of Surgical Research at the laboratories, and Director of Education for the National Defense program at Western Reserve, as well as senior instructor in surgery in the Department of Surgery. Those are the main ones.

Q. Have you had any experience in the Army relating to the medical field, Doctor, and if so tell us about that?

A. I was director of the Burn study section of the surgical research unit of the Army for some time, and also co-captain of the Army surgical research team in Korea.

This study was primarily—the burn study was in the study of burns, preparation for national disaster possibilities, and the studies in wounds were primarily to see what we could do for the care of wounded men.

Q. In your practice here in Cleveland, Doctor, do you specialize in any particular field?

A. I am diplomate of the Board of Surgery, but I do primarily vascular surgery, blood vessel surgery.

Q. Do you hold a particular position there at the University Hospitals in that field?

A. Yes, I am Chief of the Vascular Clinic and the Vascular Service.

Q. Will you tell us what cardio-vascular surgery is, and very briefly what it entails?

[fol. 692] A. Cardio-vascular means heart and blood vessels. My own particular interest is along the line of blood vessels. And this is a field that is relatively new and relatively just opening up in recent years.

Q. Are you a consultant anywhere, Doctor?

A. Yes, I am consultant in surgery to the Crile V. A. Hospital, to Highland View Hospital, and to Cleveland State Hospital.

Q. As well as being on the staff there at University Hospitals, I understand?

A. Yes.

Q. Have you or are you presently carrying on any research programs, Doctor?

A. Yes. I have been interested for a good many years in the problems of some of the responses to infection, as we see them, and I think in recent years most of my work has been along this line, although I have also been inter-

ested in metabolism or the body's response to any sort of disease or injury that may happen to it.

Q. Have you published any books or papers, Doctor?

A. Yes, I published some sixty odd papers.

Q. On what subjects, generally?

A. On the subjects of burns, vascular disease, infection, injury.

[fol. 693] Q. Doctor, at some time at the request of the Baltimore and Ohio Railroad, did you examine James Gallick?

A. Yes, sir.

Q. When was it you first saw him?

A. It seems to me it was in February of—'57 I believe, while he was at the Cleveland Clinic.

Q. At the Cleveland Clinic?

A. Yes.

Q. Will you tell us just briefly the nature and extent of your examination at that time?

A. Well, I was interested in seeing both the record of what had happened to the patient, and also the patient himself as to what was existent, and both the patient and the records were looked at, and studied at the time of the examination.

Q. You mean the records there at Cleveland Clinic, the hospital records?

A. Yes.

Q. Now, in connection with the case of Mr. Gallick, Doctor, have you at any time examined the complete hospital record at Marymount Hospital?

A. Yes, I have seen the hospital record from Marymount.

Q. The complete record?

A. I believe so.

Q. You have told us that you examined the Cleveland [fol. 694] Clinic record up to the date of your examination, which I believe was early in '57?

A. I think it was.

Q. Have you at any time since then examined the remainder of the hospital record at Cleveland Clinic on James Gallick?

A. Yes. I have seen I think it must have been, if I can

change that date. I think it must have been February of 1958.

The reason is I know I had the record reviewed up through February or March of '58, approximately.

Mr. Dudnik: You mean the original examination?

A. It must have been.

Mr. Dudnik: 2-58.

A. Yes, sir.

Q. Have you examined the hospital record from Highland View Hospital on James Gallick?

A. Yes, sir.

Q. As a matter of fact, Doctor, in your capacity as a consultant at Highland View, did you have occasion to have anything to do with the case of James Gallick since he has become a patient there?

A. Yes. I have seen him on several occasions out there at Highland View. We see all the difficult problems on rounds and he has been seen several times, and I have had actually [fol. 695] really nothing to do with his direct treatment, other than any advice I might have.

Q. Doctor, based on your examination of Mr. Gallick, your familiarity with his case since he has been at Highland View, in your capacity there as consultant, and further based upon the hospital records of Marymount, Cleveland Clinic, and Highland View; will you tell us whether or not the basic cause of Mr. Gallick's trouble has ever been found?

A. No, sir, I do not believe it has.

Q. Doctor, in the field of medicine, are there certain underlying conditions in the patient which have been found to produce the type of lesion or lesions that Mr. Gallick has?

Mr. Dudnik: Will you read that question?

(Question read by the reporter.)

A. There are diseases which produce underlying diseases which can produce lesions which look like those of Mr. Gallick's.

Q. Will you name some of those, Doctor, some of those diseases?

A. Well, we can see this with a patient with diabetes, or in a patient with a disease with a long term known as periarteritis nodosa. This means, it is an inflammatory reaction around the small blood vessels in the skin and many other [fol. 696] organs, and this can produce a picture of lesions which look like this.

There are other vascular diseases, blood vessel diseases which we do not know a great deal about. But, again, one can get skin breakdown and ulceration that looks like this. I think those are the main ones.

Q. What is the fact, Doctor, as to whether the doctors who have been active in Mr. Gallick's case, as indicated by the hospital records, have given him certain tests in an effort to identify the causative agent of his trouble?

A. They have, yes.

Q. I don't know whether the word tests is complete or not. What if anything other than tests have they done in an effort to locate the basic cause of his trouble, basic cause of his lesions I probably should say?

A. I think it is fair to say that almost everything has been done that we know how to do to try to get to the bottom of this.

Q. And what has been the net result of all of that?

A. We still don't know the cause of the trouble that Mr. Gallick has.

Q. Doctor, I would like to read to you a hypothetical question or present a hypothetical question to you.

But before doing that I want to ask you specifically in [fol. 697] the case of Mr. Gallick have tests and examinations or whatever else is necessary been done in an effort to locate any infectious disease that may be present in Mr. Gallick?

A. Yes, they have.

Q. What has been the net result of that?

A. Well, there has been no evidence of an infection. We have grown bacteria which are usually considered to be the cause of most of the infections we know about, from his wounds at every hospital and literally every time they were cultured.

These bacteria have varied tremendously in particular

types. There are many types of bacteria or germs. And on almost every culture these have varied.

Now, what this usually means to us is that these are surface contaminations. In other words, our skin, all of us have bacteria at all times on our skin. It is a normal thing and actually we couldn't get along without it, really.

While we have cultured bacteria from these wounds, we have never found a specific bacteria that would give or should give this picture that we see in Mr. Gallick.

Q. Then what is the fact, Doctor, as to whether any specific infection has been found which would account for his lesions and his trouble?

A. I think we have to say that no specific infection has been found which will account for this.

Q. Now, let's take just briefly and generally the matter [fol. 698] of diseases other than infections. Have examinations and tests been made in an attempt to locate any such conditions or diseases in that field that might account for Mr. Gallick's trouble?

A. Yes, sir. Again, many tests and examinations have been run to try to find or understand anything else that might be playing a role.

Q. What has been the net result of that?

A. Again, I think, in general, all these tests have been negative. We have not found an underlying condition, single condition, that we could pin down as to playing the role.

Q. Now, I want to present this hypothetical question to you, Doctor, and it will take me a few moments to read it.

I want to say before I start here, Doctor, that whatever facts I assume here are assumed solely and only for the purpose of this question.

* * * * * * *

[fol. 707] Q. Doctor, I want to say in the beginning that whatever facts I assume in this question are assumed solely and only for the purpose of the question and not otherwise.

Doctor, I want you to assume that James Gallick, a man who in August of 1954 was 53 years of age, and had no prior diseases with the exception of chicken pox.

That the only other mishaps he had were three or four

minor accidents before August of 1954, and he never had skin disease, skin eruptions, allergies, or any other illness of any kind.

That prior to 1954 while eating during an argument he swallowed something which caused him pain in his chest, and he called on a doctor who saw him I think once and perhaps twice from which he recovered.

Doctor, assume further that this man went to work for the B & O Railroad in 1944 as a brakeman and switchman; that all his life he has done hard manual work. The longest [fol. 708] job before that having been with the Hunkin-Conkey Construction Company in construction work.

That from 1950 to 1954 he worked very steadily on one job for the B & O Railroad known as the Downtown Number 2 job, which consisted of switching cars in the flats of Cleveland; that in that area there was a bridge known as the Columbus Road Bridge, which extended in an easterly and westerly direction, under which ran a single track or two rails which extended in a northerly and southerly direction.

That for many years before August 10th of 1954, there existed underneath the bridge a swamp or ditch area, which constantly contained water, in which were lying rats, dead rats, and dead pigeons, sometimes or most of the time between twenty and thirty in the stagnant water.

That in and around those dead rats and dead pigeons there crawled and flew bugs and insects of many kinds and description.

Assume further, Doctor, that farther down that river track, or to the south, there were areas where there were other dead rats and pigeons laying around, as well as farther up the bridge toward the north.

Assume further that the greatest concentration of dead rats and dead pigeons was in that water in the ditch which ran alongside one of the rails and was directly underneath the Columbus Road Bridge.

[fol. 709] Assume further, Doctor, that this was called to the attention of employees of the company on occasions.

Assume further, Doctor, that on occasions the road men or the track men had attempted to clean that area out, but without success.

Assume further, Doctor, that on approximately August 10th of 1954, the exact date being unknown, Jim Gallick had occasion to walk underneath the Columbus Avenue bridge from a southerly to a northerly direction; that he walked on the left side or the westerly side, or the opposite from where the ditch was which contained these vermin which I have spoken about; that between him and this ditch were these two rails of the single track.

That he stopped underneath the bridge for the purpose of determining where his engine was, and therefore in doing that instead of heading north as he was walking, he was then headed south.

And that as he was standing there for about thirty to 45 seconds he saw his engine, decided to continue to proceed underneath the bridge, had started, turned north again, made one or two steps in a northerly direction, when he felt a sting or bite behind his left thigh about four inches above the knee.

That he touched, grabbed it with his hand, an object with his hand, that he squeezed it, that he heard it, and [fol. 710] felt it pop; that he did not see it, but it was about the length of three of his fingers, and as big around as his little finger.

That after he squeezed it, and it popped, he felt it roll down the back of his pants leg.

Assume further, Doctor, that that bite or sting he continued to feel it, he was conscious of a pain there at all times until seven o'clock that evening, this having occurred approximately 3:30 in the afternoon, about one-half hour after he started his daily tour of duty.

That about seven o'clock, or four hours later, when he had his dinner, either shortly after or before, he lowered his pants in a dressing room of some kind, could not see this area where he felt the pain and where he was bitten, took some soap and water and washed it, continued, however, on his tour of duty until eleven o'clock that night.

Doctor, assume further at 11:00 or 11:30 when he came home he lowered his trousers and showed his wife the area where he felt this bite, which continued shall we say to bother him, or pain him, but not too great; that she described it to him as a raised area, red in appearance,

and I think a pink center or a white center, that it was small, that it gave neither him nor her any concern, that he washed it that day, that night, continued to work that day.

The next morning she saw it again and it appeared [fol. 711] slightly larger. It gave him nor her any concern, and he continued to work for some four or five or six or seven days, washing it and treating it himself.

That about six or seven days later, the area then appeared the size of a half a dollar, was raised and pink, with a head on it, that while he was taking a bath this area with the head on it broke open, and that then he went to see a doctor.

Assume further that the doctor saw this area, does not recall or has no record of whether he took a history of how it happened or not, gave Mr. Gallick an injection of penicillin with some ointment dressing, and told him to come back in a couple of days.

That he did come back in a couple of days, Doctor, when the body was again injected with penicillin, further dressing of some kind, and told to come back, which he did.

That he came back on some four or five occasions; the last occasion being, Doctor, I think September 7th of 1954.

That at that time the Doctor examined it and decided it was resisting treatment; that rather than improving it was getting worse, and recommended that he be hospitalized for further studies.

Assume further, Doctor, that following that recommendation Mr. Gallick did not go back to the doctor, but then went to see another doctor.

[fol. 712] Assume further that the second doctor saw him on September 16, 1954, for the first time. Mr. Gallick gave that doctor the history of an insect bite, and that doctor put him in the hospital, performed the work in the hospital as shown by the Marymount Hospital record, performed the operations and tests and other procedures shown in the Marymount records.

That Mr. Gallick was not getting better. That he was in the hospital some three months the first time, that he was gone home for about three weeks, came back and

stayed in Marymount Hospital some 14 or 15 months, during which time the second doctor treated him as described in the hospital record, and that during that time many other lesions occurred on his body.

Assume further, Doctor, that his condition was getting progressively worse; that the lesions in his leg were so deep that you could see the tendons and muscles, some of which were torn, that he had atrophy, and that the doctor sought consultation, and that all the medication and treatment that was given him did not improve the condition.

Assume further, Doctor, that shortly after his discharge from the hospital the second time he was no longer the second doctor's patient, and he thereupon entered the Cleveland Clinic as a patient of the Cleveland Clinic.

That the tests and treatment and procedures shown in the [fol. 713] Cleveland Clinic records were done as shown there.

That there were many operations performed at Cleveland Clinic as shown in said records, that he was there for some two years, from 1956 to 1958.

Assume further, Doctor, that after these operations at Cleveland Clinic, in May of 1957 one leg was amputated, and approximately a year later the other leg amputated.

Assume further, Doctor, that in July of 1958 he went directly from Cleveland Clinic to Highland View Hospital where he has been a patient ever since.

And assume further that since being a patient at Highland View, the tests and treatment and other procedures shown in the Highland View records have been performed.

Assume further, Doctor, that he was examined by the second doctor referred to this week, and that there was an area on his right arm which was necrotic, and which is described and which looked like some of the areas of infection he had while he was your patient.

Assume further, Doctor, that he is a hospital patient now and will be one, and is in a condition where he requires hospitalization.

Assume further, Doctor, that it is the second doctor's opinion, based upon his recent and very brief examination, that the right arm will have to be amputated.

Again, assume, Doctor, for purpose of this question that [fol. 714] Mr. Gallick was bitten or stung behind his left thigh at or about the time previously stated, and while at or near a place where there was stagnant water, dead rats, dead pigeons, and insects flying about as previously outlined.

Now, Doctor, assuming for the purpose of this question only that everything that I have given you in this hypothetical question is a fact, based on that and based upon your knowledge of the hospital records, and your observations of this man, do you have an opinion based on reasonable medical certainty as to whether or not there is a direct and proximate causal relationship between the ditch containing the water, stagnant water, the dead rats, the dead pigeons, the insects flying about it on that day, and his present condition, and you will answer the question yes or no. Do you or do you not have an opinion?

A. Yes, I have an opinion.

Q. Will you state your opinion?

A. My opinion would be that the stagnant water and the dead animals, rats and pigeons I believe you stated, have nothing to do probably with the disease picture that we have seen in Mr. Gallick.

Q. Will you explain your reasons for your opinion as you have expressed it, Doctor?

A. Well, while the dead animals and pool of water with which they are connected is not necessarily a pretty picture, [fol. 715] it is at the same time not one that I am at least aware that is able to invite any type of infection, or other diseases which could cause the picture we are seeing. In other words, dead animals can attract certain insects, but they don't ordinarily attract the insects that bite man. The same way with water, except for the mosquito, for example. The thing that bothers me in trying to answer this question, I believe, is the fact that there is no way that I can relate the picture that I see in Mr. Gallick to anything that is known to come from dead rats, dead pigeons and or a pool of water.

Q. Doctor, are there certain diseases known to exist in this part of the world or this part of the country which are recognized as coming from animals, either alive or dead?

A. Yes. We have several diseases that can come from animals, primarily living animals.

Q. Has there been found in Mr. Gallick any such conditions which are recognized as coming from either alive or dead animals?

A. No, there have not.

Q. Do you have certain diseases of man which you in the medical profession recognize as coming from the bites or stings of insects in this part of the world?

A. Yes, there are diseases that are rare in eastern United States. They do occur in this part of the world, in western United States.

[fol. 716] Q. Let's take—I don't know how far you want to go medically from Cleveland, but let's take the Cleveland area generally and Northern Ohio say.

A. These I think would be very rare diseases coming from insect bite.

Q. Well, are there certain diseases recognized as coming from insect bites in Northern Ohio?

A. I think I would have to say no, in the sense of diseases.

Q. Now, by diseases are you including infectious diseases as well as other kinds?

A. Yes.

Q. Now, are you telling us that as far as Northern Ohio is concerned, you don't call to mind any infectious disease which is deemed to come from the bite or sting of an insect?

Mr. Dudnik: Just a moment. Do you mind if I have that question read? Do you mind if I have that question read back?

Mr. Leasure: I don't care. Let me withdraw it and I will ask another one. It was a long one.

Mr. Dudnik: I didn't follow it too closely.

Mr. Leasure: It may not be too clear.

Q. Let me broaden the question. In the United States are there certain diseases of man which are recognized as [fol. 717] coming from the bites or stings of insects?

A. Yes, there are.

Q. In the case of Mr. Gallick, have or have not all such diseases been ruled out?

A. Yes, I think they have been eliminated, ruled out.

Q. And is there more than one manner in which a doctor may rule out a particular disease in a person, particularly an infectious disease?

A. Yes, we try to rule out diseases, and quite frequently this is the way we arrive at a diagnosis, even by ruling out other diseases. We try to rule them out by signs and symptoms that are well known to produce certain diseases, by finding a causative agent; in some cases a bacteria, or a virus, or an injury, or something like that.

Then by the various tests that we can do on blood, and X-rays, and electro-cardiograms, and all that, things that are used routinely.

Q. Then, Doctor, to cover both diseases coming from live or dead animals, and those coming from the bites and stings of insects, what is the fact in Mr. Gallick's case as to whether or not all such infectious diseases, whether from animals or insects have been ruled out, by either tests or symptoms?

A. Well, I think that the thing in my mind that is im- [fol. 718] portant is that we have never proven, unfortunately, what the cause of this is. And that, I think, tends to rule out in my mind, without finding the cause, and I am hard pressed to say anything ahead of that, really.

Q. Doctor, what do you say, what is the likelihood of Mr. Gallick's difficulty being caused by an unidentified micro-organism of some kind picked up at the beginning of his trouble?

A. Well, I think it is unlikely, but one has to say that while it doesn't seem likely we are going to find any new bacteria in the world, any new germs, one can never say we won't. This area has been worked over very thoroughly, and it seems what we are learning now is more about how they work, how bugs or bacteria or germs work, what they do, and so forth, rather than finding new ones. But one couldn't say, on the other hand, that there might be some agent as yet unknown.

Q. What do you think the likelihood of that is, however, Doctor?

A. I think it is unlikely only because I believe it is unlikely we will find any new startling bacteria as time goes on.

Q. Do you think you have pretty well found them all, at least?

A. I think we found them. I don't think we know what [fol. 719] they do.

Q. At least, you found them to the extent that you can recognize them when they are there?

A. Yes. To the tools that are available today, the electron microscope, I think the inanimate objects have been found.

Q. And have you found any such bacteria or microorganisms, or whatever you call them in the case of Mr. Gallick which would account for his trouble?

A. No, there is no—there is no single agent, bacteria, germ, that we could say causes this picture that we are seeing in Mr. Gallick. This is not at all typical of any organism which is common in this part of the world.

Q. Doctor, have you on occasions seen other patients with lesions that have similar appearance to those that Mr. Gallick has?

A. Yes, I have.

Q. I don't mean particularly to the extent that he has them, or the number that he has, but the appearance of the lesions themselves?

A. Yes, I have.

Q. In your experience, Doctor, have any such patients given a history of having been bitten by an insect and their trouble having started in that way?

A. No.

Q. At my request, Doctor, have you made some exami- [fol. 720] nation of medical literature on the subject of ulcers which have a similar appearance to Mr. Gallick's, to determine whether there are any reported cases in the medical literature that identify an insect bite as the beginning or the source of the trouble?

A. There are none that I ran across.

Q. Will you tell us briefly what the extent of the search that you made was, and approximately how many cases were reported?

A. Well, I looked up the more recent medical literature on this material over the last three or four years, partly limiting it to that because the interest in much of this type of problem has been extended in the last three or four years. While many of these things were studied by the German scientists at the turn of the century, I think it has been re-emphasized and a much closer look taken in the last few years, as our tools have developed in an attempt to understand some of these things.

And in searching that literature, which could in no way be interpreted as the world's literature, it is primarily the literature of the United States, I did not find any instances of this type of lesion as caused by a bug bite, insect bite.

Mr. Leasure: You may cross-examine.

[fol. 721] Cross examination of Dr. John H. Davis.

By Mr. Dudnik:

Q. Doctor, do you know that Dr. Carl Hammond examined Mr. Gallick, also, on behalf of the B & O Railroad?

A. Yes, sir.

Q. And did you talk with Dr. Carl Hammond?

A. No, sir.

Q. Did you confer with him?

A. No, sir.

Q. Have you been shown any letter that he wrote regarding Mr. Gallick?

A. Yes, I saw a letter regarding him.

Q. And in that letter did you read his comment, quote—

Mr. Leasure: I think I will object, your Honor. Just a moment. There is an objection.

Mr. Dudnik: He read the letter, your Honor. I can test his memory.

Mr. Leasure: I probably should have objected to that, too, but I didn't. I certainly am objecting to this. As I explained, Dr. Hammond is not able to be here himself. If he were either side would call him, of course, but it is important that the man speak for himself, not produce his knowledge through some other witness.

Mr. Dudnik: Your Honor, that has been said three times, [fol. 722] and I ask that the jury be instructed to disregard it.

The Court: If Dr. Hammond were available obviously he would be the best evidence.

The Court has permitted this witness to testify from records of the various hospitals dealing with the history of this patient. If he has other information coming from other sources than the hospital, the Court will permit the witness to testify.

Mr. Leasure: Note an exception.

Q. I am quoting the language from Dr. Hammond's letter. Did you read that: "It appears to this examiner that this chain of events can be fairly attributed to the insect bite especially since no other causative factor can be determined."

Did you recall seeing that?

A. Yes, sir.

Q. Do you agree with that? Do you agree with that statement, Doctor?

A. No.

Q. Thank you, Doctor. Doctor—

Mr. Leasure: May the doctor be permitted to explain? I think he was cut off there.

Mr. Dudnik: He answered my question, no he doesn't agree.

[fol. 723] Mr. Leasure: Did you want to add anything else, Doctor?

Mr. Dudnik: Just a moment.

The Court: You can take that up on redirect.

Mr. Leasure: Isn't the doctor to be permitted to complete his answer?

The Court: I didn't gather that the doctor—did you want to add something?

Mr. Leasure: He didn't have a chance.

The Court: —to it, yes or no?

The Witness: Yes.

The Court: I thought he had completed his answer.

Mr. Dudnik: The reason I stopped, your Honor, is not to stop the doctor, because he has a chance to answer for Mr. Leasure.

He answered that question yes or no that could be answered yes or no. But I will yield.

The Court: He may qualify his answer.

A. The only thing I want to say is that I can certainly see what the doctor meant, I think, in that there is no other cause found. But this is the very point that has plagued me right along. It doesn't, I wouldn't go so far as to say, [fol. 724] then, that the insect bite must be the cause. See, that is what bothers me.

Q. I follow you, Doctor. But the doctor did say no other cause, but he also in that letter said, "this chain of events can be fairly attributed to the insect bite."

Now, I ask you—

Mr. Leasure: Just a moment. Let's not take a phrase out of context here. Read it all.

Mr. Dudnik: I read the whole—I read it, your Honor, here it is. I will read it again.

The Court: Is that an entire paragraph that you read?

Mr. Dudnik: Yes.

Mr. Leasure: It is a part of a sentence, your Honor. He takes part of the sentence and leaves the rest.

The Court: Re-read the entire sentence.

Q. I will re-read it and then I am going to break it down. I am going to re-read it again, the entire sentence as I read it before, Doctor.

"It appears to this examiner that this chain of events can be fairly attributed to the insect bite, especially since no other causative factor can be ascribed."

[fol. 725] Now I have read it. Now I am going to ask you a question. You answered my question by saying you think you understood, or you interpreted what you thought the doctor meant because there were no other causative factors.

I say to you he also says, does he not, besides that that the chain of events can be fairly attributed to the insect bite. Do you agree that he says that?

A. I agree that he says that, yes.

Mr. Leasure: I object. It speaks for itself.

Mr. Dudnik: Your Honor, can't I cross-examine the witness?

Mr. Leasure: I can object, too, and I am objecting.

The Court: Objection overruled. Proceed.

Mr. Dudnik: Might I have the answer read?

Q. Did you answer that question?

A. Yes, I agree that he said that.

Q. Fine. You, however, do not agree with the doctor?

A. I qualified agreement with him.

Q. Now, Doctor, you were given some facts which came from the evidence in this case, and they were contained in a hypothetical question which was given to you by Mr. Leasure.

[fol. 726] Now, inasmuch as those facts came from the evidence, I ask you to assume them to be true. With that assumption—

Mr. Leasure: Just a moment. We are getting into this, this is argumentative, of course, and the time for argument is later. I am objecting to the preface which has just been stated. I think it should go out and the jury instructed to disregard it. If he wants to pose a question—

Mr. Dudnik: Can't I ask a question, your Honor, without—

The Court: You had not completed the question?

Mr. Dudnik: It is all one question, your Honor.

The Court: Had you completed the question?

Mr. Dudnik: I don't remember whether I completed it, your Honor. I just don't remember now.

The Court: Let's go back to the start of that last question.

(Last question was read by the reporter.)

Mr. Dudnik: No, I am not finished.

The Court: Complete your question.

Q. With that assumption, Doctor, we know, do we not, [fol. 727] that Mr. Gallick had no previous diseases or illnesses except chicken pox, we have that, do we not?

A. No, sir.

Q. Well, where is it any different?

A. Well, if I interpret you correctly, you say we know he had no previous diseases?

Q. Yes.

A. We don't really know that, I don't think, I mean I am talking medically now, unfortunately, but to me, as I gather, he was not actually examined for some period of time. So I don't think I can say he had no previous diseases.

Q. Then I want to be absolutely correct and follow the facts and I am not going to do this again, read this question again—these people might jump out of their seats—what you are asked to assume is that he had no prior diseases with the exception of chicken pox. Now, I ask you to assume that.

A. All right.

Q. Now, with that assumption, we have a man who had no prior childhood diseases, with the exception of chicken pox, and a sprained ligament, is it fair to say that with that assumption that whatever started this man's trouble started with the sting or bite?

A. No, sir.

[fol. 728] Q. Is it fair to state, Doctor, that whatever started this man's trouble, started at the site, at the point where he was bitten or stung?

A. I am asked to assume he was stung?

Q. Yes.

A. All right. Yes, I think that is true.

Q. That is fair to assume, we agree on that?

A. Yes.

Q. And then from this bite which you are asked to assume, and from this little white or pink head spread the first ulcer, is that fair to state?

A. Yes.

Q. Which became larger and larger until it required some attention; is it fair to state that there is a relationship between—is it fair to assume, Doctor, that there is a relationship—withdraw that.

You, I believe, have checked all of the hospital records at the request of Mr. Leasure?

A. I believe so, yes, sir.

Q. Didn't you see in the Highland View records a diag-

nosis, either provisional or final, pyoderma-gangrenosa, secondary to insect bite?

Mr. Leasure: Which hospital record was this?

Mr. Dudnik: Marymount, I am sorry.

[fol. 729] Mr. Leasure: Marymount?

Mr. Dudnik: Yes. I am sorry.

A. Yes, sir.

Q. And that he was treated for some 15 months with that diagnosis?

Mr. Leasure: I object to that, your Honor. That diagnosis was not entered until he left Marymount Hospital.

Mr. Dudnik: Well, the doctor said yes, if—

The Court: The only thing I remember is that the doctor—

Mr. Leasure: It was entered when he left the second time.

Mr. Dudnik: Now, Mr. Leasure, this was when he just entered the hospital the second time, 15 months before he was discharged.

Mr. Leasure: All right, but it is the second entry, the second entry, not the first.

Q. He was treated for some 14 months following a diagnosis of pyoderma-gangrenosa, secondary to insect bite, isn't that so?

A. Yes.

Q. And the final diagnosis was the same, was it not, Doctor?

A. Yes, sir.

[fol. 730] Q. And that's when he left the hospital after a stay of some 14 months?

A. Yes.

Q. What is the meaning of secondary to insect bite?

A. Secondary usually means that it followed some previous difficulty. We say that certain things can happen after something else.

Q. In other words, then, do I take this to mean that the diagnosis, both provisional and final, was pyoderma-gangrenosa following an insect bite?

A. Yes, that's correct.

Q. Do you agree with that, Doctor?

A. Here, again, to me, I would say no. I do not, in a qualified way. I think pyoderma-gangrenosa is all right, which simply means death of skin. It is a descriptive term rather than meaning anything else. Whether or not it is caused by an insect bite, I think is still—I just would say I don't believe it is.

Q. Then you agree—will you disagree, then, with the diagnosis in the hospital. I mean with relation to the cause?

A. Yes.

Q. I know you agree with the term gangrenosa?

A. That's right.

Q. But you do not agree that it is secondary to an insect bite, is that correct, then?

[fol. 731] A. Yes, sir.

Q. You do not agree that it followed an insect bite?

A. I don't agree that I have medical evidence that it followed.

Q. No.

A. Because that's what I—you see, the only thing I have to go on is whether or not I have some medical proof. Theories I gather you are not interested in in the court room.

Q. No, but I am interested in probabilities, Doctor, and I am interested in—well, probabilities.

Now, would you say, then, that it is not probable that whatever he developed followed that insect bite?

Mr. Leasure: Just a moment. I think I will object unless the question is clarified whether he means followed simply in point of time, or followed in point of some medical causation.

Mr. Dudnik: If the doctor doesn't understand the question, I would be glad to rephrase it, your Honor. If he does, I would like an answer to the question.

A. Let me ask you one thing, in probable, again, probabilities bother medical people. Do you mean that it is at all possible, or that I believe that this happened?

Q. No, Doctor, probabilities may bother medical people, but that is what we go by in the law in trying cases. We go [fol. 732] by probabilities and not possibilities.

So with that explanation I wonder if the question that I

asked can be answered by you, and I am going to have it read, Doctor.

(Following question was read by the reporter:)

"But you do not agree that it is secondary to an insect bite, is that correct, then?"

A. Read it again.

(Same question was read by the reporter.)

A. I would answer that by saying that lack of evidence makes it not probable in my mind.

Q. In other words, you haven't enough evidence from what you already know and have been told, with regard to the bite and the immediate growth and progress, as you have been told and read it from the records, you haven't enough evidence to say that there is a probability that this trouble started with that bite?

A. I don't think I could say that there is a probability that it did.

Q. Is that because you haven't been able to diagnose his condition?

A. Yes, sir, because probability to me is a fairly strong term meaning I am pretty satisfied with it. The very fact that we never have pinned this down bothers me.

Q. Then I ask you this, Doctor, is it because you haven't [fol. 733] been able to diagnose whatever is wrong with him that you say it isn't probable that it started with that bite?

A. Yes.

Q. Now, do we agree, Doctor, that this is an infectious problem?

A. Again, I don't think I can agree it can, since we don't know what it is apparently.

Q. All right, Doctor. Certainly it is not a systemic condition?

A. Again, I can't say yes or no, in that it is not proven.

Q. You have ruled out—what systemic diseases are there that might or can produce these lesions, name them to me one at a time.

A. All right. Diabetes—

Q. Stop there. Did you rule out diabetes?

A. Yes, I think pretty well.

Q. What is the next one?

A. The next one is periarteritis nodosa.

Q. Is that a medical entity?

A. Yes, inflammation.

Q. Did you rule that out?

A. Yes, I think so.

Q. What is the next disease that would produce similar ulcers; systemic?

A. I think a hyper-allergic state. I am avoiding the word [fol. 734] disease because we know so little about it really. We call it a state rather than a disease. But a person who is hyper-allergic to certain things.

Q. Have you ruled out previous allergies?

A. Yes, previous allergies.

Q. Have you ruled out allergy, then?

A. No, sir.

Q. Then you say it may be an allergy, is that correct?

A. Yes, sir.

Q. Then is it fair to state that it may be an allergy that started with this bite or sting?

Mr. Leasure: I think I will object; it calls for a possibility.

Mr. Dudnik: Do you recall, your Honor, if I may say, on cross-examination of Dr. Ippolito and Dr. Anderson, Mr. Leasure posed many many questions on possibilities, and they were not attacked.

The Court: I am going to sustain the objection, and I want to say to the ladies and gentlemen of the jury that we have had a number of experts testify here. The Court now wishes to make clear to you, the jury, the law relative to issues of fact.

First, you the jury as the triers of issues of fact may [fol. 735] only determine probabilities; second, you may not arrive at the facts based on testimony as to mere possibilities. Third, the only testimony you may use in arriving at a verdict is testimony which relates to probabilities.

Therefore, at this time the Court instructs you to disregard all testimony based on possibilities, or what could have happened, and directs you to arrive at your verdict based only on a determination of probabilities.

Mr. Dudnik: Your Honor, may I ask whether that applies to anything these people remember that was asked by Mr. Leasure with relation to possibilities?

Mr. Leasure: No objection.

Mr. Dudnik: I will be going for a while yet, your Honor.

The Court: Well, at this time we will recess for the luncheon period, once more with the admonition that you do not talk to anyone about this case, not even amongst yourselves. You will return at 1:30.

(Thereupon a recess was taken.)

[fol. 736] Friday afternoon session, 1:30 p.m., June 19, 1959

Cross examination of Dr. John H. Davis, Resumed.

By Mr. Dudnik:

Q. Dr. Davis, you have ruled out diabetes, and then that long condition you talked about which you said was a medical entity, and you ruled that out, and you did not rule out, however, allergy, did you?

A. No, sir.

Q. Let's leave allergy out for the moment and go to the next disease which produces similar lesions that you know of?

A. I think these are the only diseases really that would do it commonly. There are perhaps some things that might do it much more rarely. Do you want those?

Q. Well, have those been ruled out?

A. I believe they have, yes, sir.

Q. Then is it fair to state that every known condition which produces similar lesions, with the exception of allergy have been ruled out?

A. Yes, sir.

Q. Now, you told us before that—unless I am mistaken—you told us before that he did not in your opinion have a prior allergy?

A. True.

Q. Is your opinion, Doctor, that simultaneously with this [fol. 737] insect sting or bite he developed an allergy?

A. Not simultaneous with, necessarily. Let me add here that this business of hyper-allergy, I think the jury should understand—

Q. Yes, surely.

A. —is a theoretical thing to a great degree that we are talking about today. We know so little except that we do know that patients—and I use the term simply to try to explain it—for example, you see the person who gets one boil after another; he is no different than you or I, as near as we can tell. So we say he is hyper-allergic to a particular organism that causes the boil, staphylococcae in this case.

Q. You mean staphylococcae in the boil?

A. In the boil, yes. This is really theoretical until we can prove eventually that this is true.

So I am talking in these terms when I use this term hyper-allergy. There is no single test that we could show that this exists. And yet such possibilities are I think definitely there. They are written about in the medical literature. This isn't only my theory, by any means. It is well established as a theory, not as a proven entity.

Q. Doctor, have you completed your answer?

A. Yes, sir.

Q. Now, Doctor, is it your opinion that this allergy that [fol. 738] you speak of, or hyper-allergy, is related to this bite?

A. I think I would have to answer that by saying that I believe the hyper-allergy is related to the condition as I have seen him. Again, until I know what causes the entire condition, all I think I can say is that it is related to the hyper-allergy—the hyper-allergy may be related to his present condition.

Q. Fine. I now are going to ask you consider the question again only because I want to see if you can answer my question; although I appreciate your last explanation I don't think it answers my question. If I am wrong we will try it again.

Mr. Dudnik: Would you read the question?

(Following question was read by the reporter:)

"Now, Doctor, is it your opinion that this allergy that you speak of, or hyper-allergy, is related to this bite?"

A. Do I have to make the assumption there is a bite?

Q. Yes, you do, Doctor.

A. Still?

Q. Yes, we are going to assume that he had a bite, yes.

A. The reason for my asking that is, again, medically I have no proof of a bite. But—

Q. Well, let's go back, then, let's hold that question for [fol. 739] a minute and develop that bite.

Mr. Dudnik: Mark that question; I may want to have you read it again.

Q. Now, Doctor, in your profession, diagnosis of course is an important factor?

A. Yes, sir.

Q. Diagnosis is made after history is obtained, is it not, Doctor?

A. Yes, sir.

Q. If you don't have a history, you are hampered in your diagnosis, I presume, is that a fair statement?

A. Yes, that is true.

Q. So that when a patient comes to you for treatment of some ailment, the first thing you ask him is "Tell me how you got it and where it first manifested itself, tell me about it"?

A. Yes, sir.

Q. Is that an important part of your diagnosis and treatment?

A. Yes, it is, but we don't always believe the story we get, even though it may fit.

Q. Have you any reason not to believe Jim Gallick?

A. No, sir.

Q. Then did you read the history in many places in several hospital records, Doctor?

[fol. 740] A. Did I read what?

Q. The history of the original bite in many places?

A. Yes.

Q. In all the hospital records?

A. Right.

Q. And they all give a history of an insect bite, do they not?

A. Yes, sir.

Q. Have you asked Mr. Gallick what happened before you examined him?

A. I believe I did.

Q. And did he tell you about the insect bite?

A. Yes.

Q. And I believe you said you had no reason to disbelieve him?

A. No reason to disbelieve him.

Q. Now, let's start with the insect bite, and will you read that question before, please?

(Following question was read by the reporter:)

"Now, Doctor, is it your opinion that this allergy that you speak of, or hyper-allergy, is related to this bite?"

A. No, it is not.

Q. Is it your opinion, Doctor, that this hyper-allergy [fol. 741] started after this bite?

A. I would believe it had to be present at the time of the bite, inasmuch as I don't know what starts it, I have to assume it is there.

Q. And that with a history that he had, no allergies before, Doctor, you still believe it had to be present before?

A. Yes, because—

Mr. Leasure: Just a moment. This question I think assumes something which certainly has not been established. He says with the history that he had no allergies before.

Mr. Dudnik: Rather than refer to the record, I will withdraw the question and put it another way.

Q. And that, Doctor, you believe although you have a history of only chickenpox at childhood, and no other diseases?

A. Yes.

Q. That being the case, Doctor, is it your opinion that the bite or the sting started a condition which he may have had before, which never in 53 years asserted itself, and produced the result that he has now?

A. The question is is it my opinion that this did cause the—

Q. Do you want the question read?

A. Please.

(Last question read by the reporter.)

[fol. 742] A. I think this is a possibility, yes.

Q. We are dealing with probabilities, Doctor, as the Court has said.

A. I think I would have to say that until I know the cause I cannot say that this is probable.

Q. Then you cannot answer the last question until you know more about the cause?

A. Correct.

Q. You are unable, then, as far as the questions I have asked you to enlighten us?

A. Yes, sir.

Q. Doctor, is a bite or sting from a bug a trauma?

A. Yes.

Q. What is the meaning of the word trauma?

A. I believe it means any injury.

Q. What is the meaning of the term local trauma?

A. Local trauma means that it happened in a locality on the body rather than to the whole body.

Q. An isolated area?

A. Isolated area.

Q. Is pyoderma used sometimes instead of pyoderma-gangrenosa?

A. Yes, it can be. They do not mean quite the same but they are used together.

Q. Do you have an opinion as to whether pyoderma can be caused by trauma?

[fol. 743] A. Yes, I think it can.

Q. When did you—Marshall suggests a question to me—is it one of the recognized causes of pyoderma-gangrenosa?

A. Well, yes, I think it is fair to say it would be a recognized cause.

Q. Doctor, how many times did you see Mr. Gallick altogether?

A. I am not sure, but I don't think it was more than five. I think it was some place around four or five times.

Q. When was the last time that you saw him?

A. It was in the spring of this year at Highland View. In March, I believe.

Q. The time before that, to your best recollection? You didn't bring your records, did you, Doctor?

A. No.

Q. Where are they, at your office?

A. Yes.

Q. The time before that that you saw him?

A. It was either late in '58, I believe, or early '59. In the winter sometime.

Q. From the time of late in '58 until the last time, was his condition about the same?

A. He is not here? He is not in the court room?

Q. No, he isn't. He is here, Doctor, but I didn't want him to—Mr. Leasure and I agreed that he wasn't going to be here during the medical testimony.

[fol. 744] A. Yes, I think during this time it was about the same—as a matter of fact, at that time I felt that maybe he was improving some.

Q. Would you say there was a slight improvement the last time you saw him, over the time you saw him late in '58?

A. Yes, I believe there was.

Q. So that the last time you saw him he looked or appeared in better shape than any of the times you saw him before?

A. Yes, sir.

Q. And the last time you saw him was this spring?

A. Yes.

Q. Doctor, in your profession do you know what we mean—I am sure you do, I am not talking medically—by the will to live?

A. Yes.

Q. As distinguished from a person who doesn't want to survive?

A. Yes.

Q. What does Jim have?

A. I think he has the will to live.

Q. That helps, doesn't it, Doctor?

A. I think to the best of our knowledge, it means a lot.

Q. Psychologically it is a wonderful factor, isn't it?

A. Yes.

Q. In keeping a man alive, isn't it?

[fol. 745] A. Yes.

Q. And from your experience, a man in his condition, as you saw him recently, that has the will to live, can live many years, can't he?

A. I don't know that I can say that. I will say that I think it helps an awful lot, over the will to die, as you have pointed out. But medically I don't know that I can say that part of it.

Q. Medically can you give no prognosis?

A. Medically I think we can give a prognosis.

Q. All right, what is your prognosis?

A. Well, as I say, this spring I felt that over a period of time, some months, I really felt that he was beginning to get better and actually I was originally asked to see him with the idea could I do anything for him. Like everybody else, I failed, too. I don't think anything I did made a bit of difference.

Now, I did feel, however, that he was improving, and I thought maybe this is running its course, maybe he is going to improve.

I have been in direct contact with the people at Highland View, because of my interest in this and several other chronic problems we have out there, and go out for conferences. And since that time he has again taken a dip downhill.

[fol. 746] Now it comes to prognosis, your question. In any patient who is slowly getting better over a period of time, the doctor generally assumes they are going to get better even though all sorts of things can happen. We are always frightened of a person who has recurrent episodes of improvement and then unfortunately seems to slip back some; because, again, talking in the broad generalities of things like will to live, and so forth, every one of these little episodes certainly is a little hard on the human machine. That is about all I can say about it.

So I am not quite as enthusiastic about his prognosis now as I was a few months ago. And I would have some misgivings as to whether his prognosis now is as good as I thought it was.

In other words, while I cannot say in terms of time for sure, the prognosis, I think when a doctor can he is usually kidding himself—I am unhappy that he has made this slip backwards under what we think is good care.

Q. Have you finished your answer?

A. Yes.

Q. Doctor, is it fair to state that you cannot tell us that he will not live the span that they say the Lord gives us, three score and ten?

A. I cannot say that he will not.

Mr. Dudnik: Thank you very much, Doctor.

[fol. 747] Redirect examination of Dr. John H. Davis

By Mr. Leasure:

Q. Doctor, although you say you cannot, what is your best opinion as to the likelihood of about how long he may be expected to live, in view of his present condition, and recent history?

A. Well, in view of the fact that this man has lost two legs over a period of time, and now apparently is going to lose an arm, without evidence that this disease is very much more under control than it was, and I would be very discouraged in thinking that it won't simply continue: again, we have nothing that we seem to have been able to stop this with, and it is for that reason I have no reason to suspect that it won't continue. But I cannot say.

Q. And if it does continue, that means what in terms of life expectancy?

A. Well, I think if this continues at this rate, I would say that probably he would not live more than another four or five years. In four or five years it has taken two legs and what looks like an arm.

Q. The best estimate would be four to five years?

Mr. Dudnik: Objection, your Honor. He didn't say that. That is leading and he didn't say that.

[fol. 748] The Court: The question will go out.

Q. Four to five years until what, Doctor? I don't follow you.

A. Well, I think that this disease may continue, and over a period of the next four or five years hit something vital which will take his life.

Q. Doctor, I want to get some data staked out and I think the best way to do it is to use the blackboard. Doctor, if you can help me, I would like to get in diagram form here the different categories of diseases or bodily conditions or whatever the proper term is, and I would like to start with infectious diseases, if I may, or could I shorten that to infections, would that be proper?

A. Yes, I think so.

Q. Would another category be non-infectious diseases?

A. Yes.

Q. Then what would be a third category, having had these two so far?

A. You could have the category of diseases which we know literally nothing about, which I put this hyper-allergic state into.

Q. Allergies, what term should we use?

A. Well, use the word allergy. I think it makes the most sense.

[fol. 749] Q. Now, Doctor, what is the fact, taking the category of infections, what is the fact as to whether or not infectious diseases have been ruled out in the case of Mr. Gallick?

A. I think the main thing, ruling them out, is the recurrent difference in the cultures that we have taken from the wound. This wound was an open wound, unfortunately, every time it was cultured, and that means that the cultures are essentially useless, because it only means that the bacteria there are surface bacteria, and doesn't tell us that they are the cause of the particular infection.

Q. What is the fact as to whether infections have been ruled out as the basic cause of his lesions?

A. I think the thing, again, I just said, it is ruled out because the first cultures taken were taken of an open lesion which had been open for some period of time, and reflect primarily what we call surface contamination.

Q. I am trying to find out, have infections been ruled out in his case as the basic cause?

A. I don't think I can say they have been ruled out. The only thing I can say is there is nothing to prove they are.

Q. All right. None have been found?

A. Right.

Q. Would that be a fair way to put it?

A. Yes.

Q. Now, how about non-infectious diseases, what is the [fol. 750] situation there in the case of Mr. Gallick, as to whether or not one of those is the basic cause, and I will let you express it in your own way. I don't know enough about it myself to give you a specific question on it.

A. Well, here again, I think, we have a patient who has been in three good hospitals, and has had all of the medical tests that multiple people are able to come up with, and while there is no positive thing in medicine, it is not an exact science, we have done I think everything that can be reasonably expected, and no non-infectious disease has been shown.

Q. All right, generally the same as infections.

A. Yes.

Q. Do I understand in the case of infections you have done what is known, and none have been found?

A. Yes.

Q. And that leaves you then with what, Doctor, in so far as categories of possible causes are concerned?

A. Well, in this grouping it leaves us with this allergic state.

Q. Now, Doctor, as things now stand, as the hospital records show, as you have obtained the knowledge you have first hand, as you have described it, do you have an opinion as to into what of these three categories the basic cause of Mr. Gallick's trouble most probably falls?

[fol. 751] A. I have an opinion that the allergy is playing a role in this.

Q. Getting down now to the matter of an insect bite, will you tell us whether or not you have an opinion as to whether Mr. Gallick's present condition would probably have come about whether he suffered an insect bite or not?

A. Since I believe--

Mr. Dudnik: Objection. It should be answered yes or no.

Mr. Leasure: The question is do you have an opinion.

The Court: The question is do you have an opinion, Doctor?

A. Yes, I have an opinion.

Q. Will you state your opinion, please?

A. Since I believe that the allergy may be playing a role, or is playing a role in the condition—will you rephrase that once more?

Mr. Leasure: Read it back again.

(Following question was read by the reporter:)

"Getting down now to the matter of an insect bite, will you tell us whether or not you have an opinion as to whether Mr. Gallick's present condition would probably have come about whether he suffered an insect bite or not?"

[fol. 752] A. Yes, in having an opinion, I believe his allergic state is playing some role here in this patient's condition. Therefore, I think this might well have happened with or without an insect bite.

Q. With or without an insect bite?

A. With or without.

Q. Doctor, can you tell us why it was that you were called in to consultation on Mr. Gallick's case at Highland View?

A. Well, yes, I can tell you why. As consultant there, we make rounds at specified times, and all interesting or difficult problem cases are seen by the surgeon who is at Highland View and the resident staff at Highland View, Nursing Service, and any other interested groups of ancillary medical services, and obviously Mr. Gallick was a challenge to everyone. And I was asked to see him both from the point of view of consultant and also from the point of view did I have any ideas that might help. And as I have already stated, unfortunately, I don't think that anything I added has made any difference either.

Q. Doctor, if we may turn for a moment to the subject of pigeons and rats, will you tell us based upon your ex-

perience and knowledge, what kind of bacteria you would expect to find either in or on the body of a live rat or pigeon in this area of Ohio?

[fol. 753] A. In general we find the same bacteria on animals that are found on humans, that is, there are certain groups of common skin or fur contaminations or bacteria living on skin and fur, on the floor and other places. These in general are the big groups that I think we might be interested in, would be the staphylococcae, the streptococcae, and the bacteria that is known as the colon bacillus, or escherichia, meaning it is primarily the bacteria from the human colon or the animal colon. These are common. There are many others, too, but most of them not nearly as important.

Q. Doctor, along the same line, would you expect to find generally the same kind of bacteria or a different kind of bacteria or a new kind of bacteria, on or in the body of a dead rat or pigeon, as distinguished from a live one?

A. In general, no. They would be the same, because the bacteria in the dead body in general comes from that body.

In other words, a few hours after death, the bacteria in the colon will spread through the body and on to the surface and the breakdown of the body.

Q. The bacteria that you have mentioned as ones you might expect to find on pigeons or rats, have they in the case of Mr. Gallick been ruled out as the basic causative agent?

A. They have been ruled out only in that they never have been found as the causative agent.

[fol. 754] Q. Have they been looked for as the causative agent?

A. Yes, they have.

Q. And were not found?

A. They were found, bacteria on dead animals have been found on subsequent open wounds, but unfortunately we don't know what was in the initial injury site.

Q. One last question. Are those bacteria that have been found in Mr. Gallick's ulcers the same kind or different kind than you will find on the live human body?

A. No, they are identical to the bacteria. You could culture these off anyone below the waist.

Q. Below the waist?

A. Well, there is a higher count below the waist, more of them.

Q. All right, on in the air, or under the fingernails?

A. Yes.

Mr. Leasure: That is all.

Recross examination of Dr. John H. Davis.

By Mr. Dudnik:

Q. Doctor, did I understand you to say that you find the same bacteria on live rats as you do on people, ordinary people?

A. As a general rule, yes. I am not saying that there couldn't be any other kind.

Q. Give us the others that you find on rats that you [fol. 755] don't find on people.

A. Well, it is possible to find something like—

Q. Doctor, probable, please.

A. Well, then, probable, no.

Q. None?

A. None.

Q. Then we today, all of us have the same bacteria and probably none other that you find in dead rats and dead pigeons in a stagnant ditch, is that your statement?

A. Yes, sir, I believe that is true.

Q. The same number?

A. No. I think you might well find a greater number in the dead animal, or even in a live animal, depending upon how he has been living. However, numbers per se are not too important.

Q. Numbers are not important?

A. They don't appear to be.

Q. Now, do you find the same bacteria in water, drinking water?

A. Interestingly enough, Cleveland drinking water is pretty sterile. It is quite an amazing thing.

Q. What water isn't sterile? I am talking about the same

bacteria that you find on people, do you find it in drinking water?

A. You can, yes, sir.

[fol. 756] Q. Is that a probability?

A. You mean is it probable that you can find the bacteria of people in drinking water?

Q. Is it a probability that you find the same bacteria in drinking water that you find in people that you are talking about?

A. No.

Q. Not a probability?

A. Not a probability.

Q. How about in Lake Erie water?

A. I don't think I know about Lake Erie water, I can't tell you. I can only guess there.

Q. Now, Doctor, let's assume that there was a bug, and let's assume that you were to take that bug and rub it over the face or neck of any person in this room, and take a bug of the same and similar species, and rub it over the dead rat or the dead pigeon that was in that pool or pond or swamp; you take the one bug that you rubbed over the person and inject its bite into one person, and take the bug that you rubbed over the rat, the dead rat, and inject it into the body of another person; which will more probably be infected, sir?

Mr. Leasure: Objection.

The Court: He may answer if he knows.

[fol. 757] A. I think it is more probable that neither would be, that this would be the same response in any experimental setup of a given individual.

Q. You will have the same response?

A. Yes, sir.

Q. And there would be no difference?

A. This is one of the horrible problems of infection today. May I elaborate on this a moment?

Q. Go ahead, Doctor.

A. Again, I think the jury, to the jury maybe some of my answers have appeared to be confusing—

Q. Doctor, the jury is not confused, and I don't think you should make that assumption. If you want to add to your

answer, you may. But I don't think you should assume that the jury is confused. I think they are intelligent.

Mr. Leasure: I think I will object to that.

Mr. Dudnik: You object to that statement?

Mr. Leasure: Yes.

The Court: Let's not get into the question about the jury. Doctor, refrain from referring to the jury.

A. I would like to point out that as we have studied the infection in humans, one of the very horrible parts of [fol. 758] trying to understand these diseases is that we can inject into so-called normal persons, or normal animals, tremendous quantities of bacteria; and literally produce no disease.

And we have to do all sorts of things, as we try to understand these diseases, to get the take of the infection.

I think this is why I make that statement, that in a so-called normal person, given the same bite to say me, on two different occasions, I would get the same response.

Q. The same response if you put those bugs in open wounds?

A. Yes, sir.

Q. He is your patient, isn't he?

A. Yes, sir, as a consultant.

Q. Doctor, is he your patient? Do you know what I mean by the word patient, Doctor? Is he your patient?

A. No, he is not.

Q. He is not your patient, all right. Doctor, when a person has a rash or breakout on the body, they go to an allergist and then he performs certain tests, does he not, to isolate that allergy?

A. Yes, sir.

Q. What tests were performed to isolate whatever allergy Mr. Gallick had?

A. None, because unfortunately we have no test for this type of hyper-allergic state. This is theoretical.

[fol. 759] Q. Theoretical. Now, if you had those dead rats and pigeons that were in that swamp that day that he was bit, you would have a basis for making tests for the allergy, would you not?

Mr. Leasure: I think I will object to this, your Honor, unless it is clearly stated an assumption that there were dead rats and pigeons.

Mr. Dudnik: It is, it is in your assumption, too.

The Court: It was stated in the hypothetical question put to the doctor.

Mr. Leasure: Yes, that's correct, but I did that this—

The Court: Do you want counsel to restate the assumption in his question?

Mr. Leasure: I ask that this question be made hypothetical, too, and not stated as a fact.

The Court: I assume counsel can rephrase the question.

Q. Doctor, we are going to assume that there were rats and pigeons, maybe twenty of them, dead, rotted, hides, in stagnant water on the day that Mr. Gallick was bitten by an insect that we will assume came from those rats and pigeons.

Now, you are talking about an allergy, Doctor; would [fol. 760] those specimens taken at that time help in determining if he was allergic to that?

A. No, sir.

Q. It would not?

A. No, sir.

Q. So that this is one allergy that medicine knows no way or no manner or way as to how to test for it?

A. Yes.

Q. I put that terribly but you know what I mean?

A. Yes, sir. This is a theoretical—

Q. You have answered my question, Doctor.

So far as we go here, we have no infection, none found?

A. None found.

Q. Then it is assumed you can say no infection?

A. Right.

Q. All right, we will cross that right out. We have non-infectious diseases?

A. None found.

Q. We are left with an allergy then, aren't we, Doctor?

A. Correct.

Q. An allergy that did not manifest itself before the day that he was bitten or stung by an insect?

A. Correct.

Q. And began to manifest itself immediately after that?

A. I think that is correct.

[fol. 761] Q. Now, just a couple of more questions, Doctor. This man has survived two amputations; after the second amputation, at least according to the hospital record that you have read, he was in better mental condition than before?

A. I think that is correct.

Q. Doctor, isn't it probable that having survived two amputations, he can survive another?

A. I believe he can survive an amputation, yes, sir.

Q. Doctor, is there a probability in this case that the remaining arm after the one that we talked about that will be amputated, may have to go?

A. Not probable at this time.

Q. Not probable. Is that because you think the disease has now or will by the time of the third amputation have been checked?

A. No, sir.

Q. On the basis of what has happened to this man, from the first amputation, and the second amputation, and the probability of the third amputation, do you say that it is not a probability that there will be a fourth one?

A. Yes, I say that there is not a probability.

Q. So that he will be probably a triple amputee, is that right?

A. At least that, yes.

Q. At least that. What is the worst, now that you have [fol. 762] given us the least?

A. I think this disease may go into internal organs. It doesn't have to go, for instance, to the other arm. It may go someplace else.

Q. But, Doctor, it has never yet hit an internal organ, has it?

A. I don't think we know.

Q. You know it has hit externally, don't you?

A. Yes.

Q. But you don't know that it has hit internally?

A. We don't know that it has.

Q. Have you made tests for it?

A. Yes.

Q. Has it?

A. Not by the tests.

Q. So that by the tests you have made, we can rule out, internal organs being attacked by this disease?

A. No, sir, we cannot.

Q. You won't rule them out?

A. No.

Q. But the manifestations have all been externally, have they not?

A. Yes, sir.

Q. And it has followed that course for five years, hasn't it?

[fol. 763] A. Yes, sir.

Q. Isn't it fair to state that the probability is that it will follow the same course externally?

A. Let me go back one minute in the record there. In your last statement I believe you said that there has been no internal manifestations.

Q. I thought you said so, too, but if you want—

A. I actually did. I recall to mind now the lesions this man had in his lung which were, again, never proven, whether they were this or not, but he did have a period of cavities in the right lower lobe of his lung, by the record, which subsequently cleared.

Q. They cleared?

A. Yes.

Q. But the external, eating away of the skin and the flesh never cleared?

A. That's correct.

Q. But the internal cleared?

A. Yes, sir.

Q. Then is it not a probability that it will continue to be external, and not internal, probability, Doctor?

A. I think if put that way I would say there is a probability.

Q. That it will continue to be external?

A. Yes, sir.

[fol. 764] Q. And having traveled to three limbs, is it not a probability that it will travel to the fourth limb?

A. No, sir, it still is not.

Mr. Dudnik: Thank you, Doctor.

Further Redirect examination of Dr. John H. Davis.

By Mr. Leasure:

Q. Doctor, is there anything in this case, based upon your knowledge of it, which shows that the assumed presence of dead rats and dead pigeons near where this happened played any part in causing Mr. Gallick's basic condition?

Mr. Dudnik: It has been asked and answered. But no objection.

The Court: He may answer.

A. There is no evidence, I don't think.

Mr. Leasure: Thank you, Doctor.

Mr. Dudnik: Thank you, Doctor, thank you very much.

The Court: Once more, the jury will recess for a brief period. You will return to the jury room, with the admonition that you do not discuss this case with anyone, not even amongst yourselves.

(Thereupon a recess was taken.)

[fol. 765] Thereupon, the defendant, further to maintain the issues on its part to be maintained, called as a witness Benedict Brodzinski, who, being first duly sworn, was examined and testified as follows:

Direct examination of Benedict Brodzinski.

By Mr. Hadden:

Q. Mr. Brodzinski, will you keep your voice up so we can all hear you.

Can we have your full name, sir?

A. Benedict Stanley Brodzinski.

Q. Where do you live?

A. 2498 West 8th Street.

Q. And the address which you have given us is in the City of Cleveland?

A. Yes, sir.

Q. Who do you work for?

A. Baltimore and Ohio Railroad.

Q. How long have you worked for the B & O?

A. Going on 17 years.

Q. What is your job then with the B & O during that period?

A. Well, Brakeman and foreman. At the present time, foreman.

Q. Where have you done your work for the B & O?

A. Mostly in the Cleveland yard.

Q. Mostly in the Cleveland yards?

[fol. 766] A. Cleveland yard. That takes in all of Cleveland.

Q. Have you ever worked, sir, on what is known as the downtown job or Seneca Street job?

A. Yes, sir.

Q. Can you give us an indication of when you held that job?

A. Well, I held that job I believe somewhere from around 1949 to about '52, as a foreman.

Previous to that as a brakeman, and I worked brakeman after that.

Q. Subsequent to 1952 did you ever work on that job since that time, since 1952?

A. Yes, I have worked down there on and off.

Q. Would that be by way of relief of other men who had a day off or something of that nature?

A. That's right, and then for about two years, relief job, working on Saturday and Sunday.

Q. Mr. Brodzinski, are you acquainted with the plaintiff in this case, Mr. Gallick?

A. I am.

Q. Do you recall ever having worked with him on the downtown job?

A. Well, I recall having worked with him one day.

Q. Was it only on one day or was it several times?

A. Well, I worked with him several times.

Q. Do you remember having worked with him on any [fol. 767] occasion during the month of August, 1954?

A. Well, to the best of my recollection, somewhere around there.

Q. You do recall an instance, was that one day during the month or more than one?

A. Just the one.

Q. On the occasion which you mentioned, can you recall any conversation which you had with Mr. Gallick?

A. Well, we were riding the gondola together—

Q. Just yes or no, do you remember the conversation?

A. Yes.

Q. Will you tell us where that took place, sir?

A. Well, going through Seneca Street yard to Whiskey Island.

Q. This was on a train, was it?

A. On a train.

Q. What sort of a train was it?

A. Well, a transfer, what they call.

Q. A transfer, is that some cars that are being moved from one place to another?

A. That's right.

Q. Where were the cars being taken?

A. To Whiskey Island, New York Central and Pennsylvania.

Mr. Dudnik: Your Honor, may I interrupt, may I interrupt for one second? I hate to interrupt but in as much [fol. 768] as there may be a necessity for rebuttal, may I bring Mr. Gallick in at this time?

The Court: The plaintiff is entitled to be in Court.

Mr. Hadden: May I go ahead now?

Mr. Dudnik: No, if you don't mind. I want Mr. Gallick to hear this testimony. I am sorry it didn't occur to me during the recess.

(Thereupon the plaintiff was brought into the court room.)

Mr. Dudnik: Thank you, your Honor.

By Mr. Hadden:

Q. When we were interrupted, Mr. Brodzinski, I understood you to say you were on a train moving to Whiskey Island. Do you recall what kind of a car you were in?

A. Yes, we were riding a gondola.

Q. You were with Mr. Gallick?

A. Yes.

Q. Anybody else there?

A. No, sir.

Q. Will you tell us, sir, in your own words to the best of your ability what the conversation was that you recall?

A. Well, we were riding the car and he was scratching his leg and he said that the previous day or so—he pulled up his pants leg and he showed it to me, he had a bite here, [fol. 769] an open sore.

Q. I see. This was while you were both riding in the car?

A. That's right.

Q. Was this conversation which you started or which he started?

A. No, he started. He told me he didn't know whether it was a bug or a sliver.

Mr. Dudnik: Beg pardon?

A. He didn't know whether it was a bug or a sliver from the car at that time.

Q. He showed you something on his leg, did he?

A. That's right.

Q. How did he do that?

A. Well, he pulled up his pants leg over here and to the best of my recollection it was somewhere over in here.

Q. Above his knee?

A. Yes.

Q. Whereabouts on his leg?

A. Somewhere in here.

Q. You are pointing to a little bit above your knee?

A. Above the knee.

Q. On the outside?

A. Yes.

Q. Of the right knee?

A. Of the right knee.

[fol. 770] Q. Now, you used some language to indicate what explanation he made to you about that. I wonder if you would repeat that so everybody can hear? I couldn't hear it very well.

A. Well, he said he didn't know himself whether it was a bug or a sliver from a car.

Q. From a car. Did he give you any further explanation?

A. No.

Q. Of what sort of a car he was talking about?

A. No, sir.

Q. Well, do you know if it was a railroad car or an automobile?

A. Yes, he was talking about a railroad car.

Q. Talking about a railroad car?

A. Yes.

Q. Was that the sum and substance of the conversation, or did you say anything to him at the time?

A. Well, I told him to go and see a doctor, or either get something put on it, so he wouldn't get no infection.

Q. If you can remember, Mr. Brodzinski, will you describe for us what it looked like that he showed you on his leg?

A. Well, like a good mosquito bite with the head scratched off and open right in the center, a little blood around it. It looked as though, you know, it was bleeding a little bit.

Q. Do you have any recollection, sir, when during the month of August this was that you had this discussion with him?

[fol. 771] A. No, I don't.

Q. Was that all the conversation that was had on that occasion about that subject?

A. That's all.

Q. Now, Mr. Brodzinski, have you at any time given Mr. Dudnik or any representative of his a statement about this matter?

A. I did.

Q. When was that?

A. Last Saturday.

Q. And to the best of your knowledge and belief, was what was put in the statement the same as what you told us today?

A. That's correct.

Mr. Hadden: Your witness.

Cross examination of Benedict Brodzinski.

By Mr. Dudnik:

Q. I am going to have that last question read to you and I want you to answer it again.

(Last question was read by the reporter.)

A. That's correct.

Q. You read the statement?

A. Yes, sir.

Q. And you signed it?

A. Yes, sir.

Q. And you wrote, "I have read this 4-page statement," did you not?

[fol. 772] A. Yes, sir.

Q. And it is the truth, is it not?

A. Yes.

Q. And you said it was the truth, did you not?

A. To the best of my knowledge, yes.

Q. To the best of your knowledge, and you had no trouble reading it, did you?

A. Yes, some places I did.

Q. Did you have trouble reading it some places?

A. That's right.

Q. What was the reason that you had trouble reading it in some places?

A. Well, the printing in there and the writing.

Q. The printing or the writing was hard to read; was there some of it you had trouble reading?

A. That's right.

Q. Now, sir, show me where that mark was that Jim Gallick showed you.

A. Somewhere around in here, to the best of my recollection.

Q. Stand up, please, sir. Let the jury see it. There?

A. That's right.

Q. You remember seeing that, of course?

A. Yes.

Q. You remember that distinctly, do you not?

A. I said to the best of my recollection. It has been so [fol. 773] long I didn't make a point to remember it.

Q. And you remember that it was the right leg, do you not?

A. I think it was, yes.

Q. When did you first talk to anybody about this case?

A. About two weeks ago.

Q. And who was the first man you talked to?

A. To Mr. Glenn from the Claim Department.

Q. Did you give him a statement then?

A. Yes, sir.

Q. Then who was the next person you talked to?

A. Well, the attorneys, the Baltimore and Ohio and Mr. Glenn.

Q. Did you give them a statement then?

A. I did.

Q. Was that two statements now you have given?

A. No, it was just going over the first statement what they took.

Q. Well, did you give them another statement is what I am asking about.

A. No, I don't think I had.

Q. Beg pardon?

A. I don't think I have. I believe—the same statement they took the first time, they read it over.

Q. They read it over to you?

A. Yes, they wanted to check to see whether I said all that.

Q. All right, when was the next time you talked to any-
[fol. 774] body else?

A. Well, a day or two before I talked to one of your attorneys.

Q. Where was this?

A. At the attorney's office.

Q. At what office?

A. In the Union Commerce Building.

Q. Was that the third time you talked to anybody about this?

A. That's correct.

Q. And all three times so far it is representatives of the Baltimore and Ohio Railroad, right?

A. Yes.

Q. When was the next time you talked to anybody about this?

A. The next time? Yesterday.

Q. And who did you talk to then?

A. Representative of the railroad.

Q. Who was it, one of these two lawyers?

A. The attorneys and Mr.—

Q. And Mr. Glenn, the Claim Agent?

A. That's correct.

Q. So you talked to them four times, did you not?

A. Correct.

Q. When was the next time you talked to anybody about it?

A. Today, right here, that's all.

Q. Well, how did I find you?

[fol. 775] A. I guess Mr. Cook told you about me.

Q. Right out on the railroad looking for witnesses, wasn't he?

A. That's right.

Q. Last week?

A. That's correct.

Q. And he was hanging around that yard looking for people who saw this accident, wasn't he?

A. I don't know what he was looking for.

Q. But he found you, didn't he?

A. Yes.

Q. And he asked you for your name and you gave it to him, is that correct?

A. That's correct.

Q. And then a man came out from my office to see you Saturday, didn't he?

A. No, he called me up Thursday and said he would be out Friday.

Q. Oh, was it Friday?

A. And he didn't come out Friday. He came out Saturday.

Q. He came out Saturday, and did you tell him the truth?

A. To the best of my knowledge I certainly did.

Q. Well, now—you don't have to know whether it is to the best of your knowledge, did you tell him the truth as you knew it?

[fol. 776] A. I told him the truth as I knew it.

Q. Now—

Mr. Leasure: May we see that?

Mr. Hadden: May we see that?

Mr. Dudnik: Yes.

(Plaintiff's Exhibit 25-A, B, C and D was marked for identification by the reporter.)

Q. Now, I am handing you four sheets of paper stapled together marked Plaintiff's Exhibits 25-A, 25-B, 25-C, and 25-D. The first page is 25-A, and I ask you to read this name.

A. Benedict Brodzinski.

Q. The second page is marked Exhibit 25-B and I ask you to read that name.

A. That is Benedict Brodzinski.

Q. Who signed this?

A. I did.

Q. That is 25-A; who signed 25-B?

A. I did.

Q. What is the name on 25-C?

A. Benedict Brodzinski.

Q. Who signed that?

A. Me.

Q. Now, I want you to read what is written on the side of Exhibit 25-D.

A. "I have read the 4 pages and are true."

[fol. 777] Q. Who wrote that?

A. I did.

Q. Who signed it?

A. I did.

Q. Then you read these four pages, did you not?

A. Well, quickly. I took it for granted that he put in there what I told him.

Q. I didn't ask you whether you took anything for granted. I asked you whether you read these four pages?

Mr. Leasure: I am going to object to that, your Honor. The witness has answered the question. Just because he doesn't like the answer is no reason—

Mr. Dudnik: I like the answer. I don't like your speeches but I like the answer.

Q. Now we will go back. You wrote this down yourself?

A. I did.

Q. "I read these four pages and are true"?

A. Yes.

Q. You meant that what you said in there was true, did you not?

A. Yes.

Q. And you meant by writing that that you read these four pages, did you not?

A. Like I answered once more, quickly.

[fol. 778] Q. Quickly?

A. Because he was there for two hours.

Q. He was there for two hours?

A. Yes.

Q. Were you asked first—when were you asked first how long he was there?

A. When was I asked first?

Q. Yes. Did Mr. Glenn or any gentleman ask you how long this man was in your house that came from my office?

A. No, sir.

Q. Now, you said some of it you may have had trouble reading?

A. Some of it I went over quickly.

Q. Do you see anything on this front page—and I don't want to stand in front of Mr. Leasure—that you would have trouble reading? Just look at it and tell me whether you would have any trouble reading it.

Do you have any trouble reading that, sir?

A. No.

Q. Will you start reading, and read until you have trouble, read it plainly so the jury can hear you.

A (Reading) My name is Benedict Brodzinski.

The Court: Speak a little louder.

A. I live at 2498 West 8th Street.

The Court: Just a minute. Can the juror way at the end of the jury box hear?

[fol. 779] Will you speak up loud enough so they can all hear you.

A. My phone number is Prospect 1-0728. I am married, have seven children. Three are married and four are still at home.

I am employed by the Baltimore and Ohio Railroad for the past 17 years, and have been foreman for the past 16.

I have been working around the Columbus Road bridge area since 1948, '49, on or about.

Mr. Leasure: Excuse me, your Honor. Has he been asked to read the whole thing?

Mr. Dudnik: Yes.

Mr. Leasure: Well, I am objecting to that, of course.

Mr. Dudnik: All right. Then we will read the part that is pertinent. We will read the part that is pertinent.

Q. I am going to mark a little check here where I want you to start reading, and I will mark it where I want you to stop.

Now, read from here to here, sir, will you, real loud so the jury can hear you.

A. Your Honor, may I say something on this before I read it?

Q. No, just a moment. You will have plenty of time, you can say all you want, but I want that read.

Mr. Leasure: Just a moment. Let's see what he has [fol. 780] been asked to read.

Mr. Dudnik: I have him for cross-examination.

The Court: You may see what has been marked out there for the witness to read.

Mr. Leasure: Where is the mark out there what you want him to read?

Mr. Dudnik: Surely, I want you to see it. I showed you the whole thing.

Mr. Leasure: On my request you did.

Mr. Dudnik: I am sorry, I got excited and lost my head.

Q. Read that part loud and clearly so the jury can hear you.

A. I have been working around the Columbus Road bridge area since 1948, '49. On or about August 1, 1954, I was working with Jim Gallick on second trick, and he mentioned to me that the previous day he was bitten by a bug and pulled up his pants leg and showed me his leg. It was itching him, and when I looked at it it looked like a mosquito bite with the top off, and the skin was broken from scratching. Open with some blood. You could see that it was flesh. He told me about it because it was bothering him. I told him to see a doctor or go to the drug store and put something on it.

Q. Now, without reading any more, read to yourself that whole statement and find in that statement anything that [fol. 781] says anything about a sliver.

Mr. Leasure: I think I will object to this, your Honor. The real question is whether this man told Mr. Dudnik's representative anything about it, not whether the representative put it in there or not.

The Court: The statement is before the Court. Counsel has requested the witness to read the statement, and certainly after the witness has read the statement counsel has a right to ask him any questions pertaining to the statement.

Now, as I understand it, counsel has asked the witness to read the statement?

Mr. Dudnik: Yes.

Mr. Leasure: We object.

The Court: Objection overruled. Read the statement, sir.

Q. When you have finished reading it, Mr. Brodzinski, let me know and then I will have a question or two to ask you.

Have you finished it?

A. Yes, sir.

Q. Is there anything in the 4 pages—

A. No, sir, there isn't.

Q. —about a sliver?

A. There isn't. He didn't put it in, because I gave him the [fol. 782] same statement. He asked me, he wanted the same statement that I gave the B & O attorney and the Claim Agent, and I told him the identical thing.

I was going over it fast and I thought he was putting it down. When I was signing it, I was reading it fast so he could get out. He didn't put it in there and it sure ain't my fault.

Q. In other words, Mr. Brodzinski, you notice that it isn't in there now, don't you?

A. I do.

Mr. Leasure: I think I will object to this, your Honor.

Mr. Dudnik: This is cross-examination. This is cross-examination, your Honor, I am entitled to cross-examine the witness, if the Court please.

The Court: He has answered that the word sliver is not in the statement.

Mr. Dudnik: I know, but now there is further questions I have to ask, if your Honor please.

The Court: You may proceed.

Mr. Dudnik: Read the question.

(Last question and answer were read by the reporter.)

Q. And you called it to my attention now and to everybody in this room, didn't you?

[fol. 783] A. That's right.

Q. Did you call it to the attention of the man who took your statement?

A. If I had noticed that when I was reading it—

Q. No, no, that isn't my question, sir.

Did you call it to the attention of the man from my office who took your statement?

A. I told him about it.

Q Did you call to his attention the fact that that wasn't in here?

A. No, I didn't.

Q. You did not?

A. I did not.

Q. You read it and you signed each page, and you signed the end, and you had no trouble reading this, did you?

A. No.

Q. And the sliver was out of there, as you see it is, but you made no mention of it to the man?

A. Well, I made a particular study for it now. At that time I didn't.

Q. You made a study for it now.

Mr. Dudnik: I offer this statement in evidence, if the Court please.

Mr. Hadden: Objection, your Honor. Only a certain portion of it is pertinent and that has been read to the jury, [fol. 784] and that is sufficient.

Mr. Leasure: We object to it further, your Honor, and at this time I would like to know the identity of this representative. I am giving consideration to subpoenaing him for our case to find out what is going on.

Mr. Dudnik: He is a very fine and capable lawyer who works for me.

Mr. Leasure: I'm sure he is capable for certain purposes.

Mr. Dudnik: And I would like to know the identity of some of your people.

The Court: All these are not part of the case.

(Thereupon Court and counsel conferred at the bench outside the hearing of the jury.)

Mr. Dudnik: Your Honor, if there is an objection to the statement I will withdraw it from the evidence. I withdraw it. I withdraw it but I will ask one or two more questions.

Q. Were there dead pigeons and rats under that bridge?

A. At that time, yes.

Q. At the time when he was bitten?

A. Well, I don't know when he was bitten positively.

Q. About the time?

[fol. 785] A. About the time, yes. We always see a few rats here or dead pigeons there.

Q. Under the bridge I am talking about.

A. There were some under the bridge, too.

Q. Is this a fair statement, with relation to the condition under the bridge at the time, about the time when Mr. Gallick—

A. Around the area of the bridge.

Q. I am going to read you and ask you if this is a fair statement.

Mr. Leasure: I think I will object, your Honor. This is not to impeach the witness' answers to the questions.

The Court: I don't know what the question is yet.

Mr. Leasure: Well, he is starting to read out of the statement. I am objecting. It is not relevant or material.

The Court: I don't know whether it is relevant or not.

Mr. Dudnik: Your Honor, the issue in this case is rats and stagnant water under a bridge.

The Court: I don't know what he is going to read yet. Mr. Dudnik, will you show Mr. Leasure what you are going to read?

[fol. 786] Mr. Dudnik: Yes, your Honor. This is what I am going to read.

Mr. Leasure: I am objecting because there is nothing inconsistent here with what he has testified to.

Mr. Dudnik: Your Honor, this is cross-examination. I would like to have your Honor see this.

The Court: I can't very well make a ruling until I see what it is.

May I see counsel a moment?

(Thereupon Court and counsel conferred at the bench outside the hearing of the jury.)

Mr. Dudnik: Does your Honor rule that it is repetitious?

The Court: Yes.

Mr. Dudnik: I withdraw the exhibit from evidence. I have nothing further.

Redirect examination of Benedict Brodzinski.

By Mr. Hadden:

Q. Just one or two questions. With respect to the pigeons and rats which you mentioned, did you ever at any time underneath that bridge or in that vicinity see as many as twenty or thirty dead rats or pigeons?

A. No, never.

[fol. 787] Q. Or anything approaching that?

A. No.

Mr. Hadden: That is all.

Mr. Dudnik: That is all. Thank you.

The Court: Ladies and gentlemen of the jury, I want you to start the weekend right. We are going to adjourn after the bailiff adjourns court for the weekend, and report back Monday morning at 9:15, once more with the admonition that you do not talk about this case with anyone, not even amongst yourselves.

(Thereupon an adjournment was taken to 9:15 a.m., Monday, June 22, 1959, at which time the following proceedings were had:)

[fol. 788] Monday morning session, 9:15 a.m., June 22, 1959

Mr. Dudnik: If your Honor please, I subpoenaed Mr. Brodzinski back and ask leave to ask him a few more questions, which I had overlooked during my cross-examination on Friday, with leave of Court.

The Court: Without objection you may proceed.

Thereupon Benedict Brodzinski resumed the witness stand and was further examined and testified as follows:

Further cross examination of Benedict Brodzinski

By Mr. Dudnik:

Q. Mr. Brodzinski, you were on the stand Friday and I asked you several questions, particularly I asked you whether you had signed four pages, and you said you had?

A. Yes.

Q. Now, then, I didn't ask you or forgot to ask you whether or not your signature appears on three more places.

Now, I am handing you the third page of Plaintiff's Exhibit 25, which is 25-C, and ask you if your signature appears—

A. That's correct.

[fol. 789] Q. —where a word is crossed out?

A. That's correct.

Q. And a word written over it?

A. Yes.

Q. Then below that does your signature appear again where something is crossed out?

A. That's right.

Q. And at the bottom of the page on the last line does your signature appear again?

A. Yes.

Q. Now, Mr. Brodzinski, is it not a fact that after you read this statement you made some corrections and called them to the attention of Mr. Plevin, isn't that so?

A. That's correct.

Q. Did Mr. Plevin then make those changes by crossing out the words which you objected to and put in other words?

A. Yes.

Q. And did you then not sign at three places where you wanted changes made?

A. That's correct.

Q. Do you still say you read this in a hurry?

A. I certainly did.

Mr. Dudnik: I have no further questions.

A. The beginning of that statement—may I answer it?

[fol. 790] Q. Yes you may, sir.

A. I went over the top of it where my age and occupation, and so forth, and so on, and he questioned me of what did James Gallick tell me, or what was the conversation.

Well, I told him just exactly what it was. I took it for granted he had it in there. I skipped it over, and once in a while I would look at something else and I noticed them few things he had in there that I didn't specify in there. So he changed it.

Q. Now, then, you said you went over—you took something for granted, particularly when you related to him the conversation that you had with Mr. Gallick, and you

said you took that for granted, so you went over it hurriedly?

A. Well, not hurriedly, but I glanced over it.

Q. But when you went farther down you changed—well, here is one sentence, "On June 9, 1959, I was working this area and that pool of wate. was still there, although it hadn't rained for about a week"?

A. That's right.

Q. The word "about" is put in in place of another word. Do you remember what the other word was?

A. No, I don't. More, I think he had. More than a week.

Q. All right. You saw, then, apparently Mr. Plevin had said more than a week, when you meant to say for about a week?

[fol. 791] A. That's correct.

Q. You saw that?

A. Yes.

Q. And you called it to his attention?

A. Yes.

Q. And he crossed out the word "more" and put in "about"?

A. Yes.

Q. You had no trouble catching that, did you?

A. No.

Q. You had him add the term "it was seasonal," did you not?

A. That's correct.

Q. So that the sentence read, "There would always be a lot of bugs and insects there at that muddy stagnant pool, but it would get worse at times depending on the time of the year."

You wanted that something added there, you wanted the words "it was seasonal" added there, and he added it, didn't he?

A. Yes.

Q. And you signed the change?

A. Correct.

Q. You didn't go over that hurriedly then, did you?

A. Well, when you are glancing through you catch a word somewhere, you see it is not right, something I didn't say, he put in there.

[fol. 792] Q. So you called it to his attention. When it came to your attention whether he was bitten by a bug or scratched by a splinter, you didn't catch that in time to make the change, did you?

A. I did not, because—

Q. You may finish. I didn't want to stop you. Are you finished?

A. Just like I said, I had took it for granted that he had put in there what I told him to.

Mr. Dudnik: Thank you, Mr. Brodzinski. Thank you very much.

Mr. Hadden: That is all.

[fol. 793] Thereupon the defendant, further to maintain the issues on its part to be maintained, called as a witness Elmer Giese who, being first duly sworn, was examined and testified as follows:

Direct examination of Elmer Giese.

By Mr. Hadden:

Q. Mr. Giese, we have some questions for you, and I wonder if you will keep your voice up so everyone can hear you above the traffic noise.

Can I have your full name, sir?

A. Elmer Paul Giese.

Q. Who do you work for, Mr. Giese?

A. The Baltimore and Ohio Railroad.

Q. How long have you been with the B & O?

A. Going on 40 years.

Q. 40 years?

A. Yes.

Q. You don't look it. What is your present job with the B & O, Mr. Giese?

A. At the present time my occupation is yardmaster from 6:30 a.m. to 2:30 p.m.

Q. That is here in Cleveland?

A. Yes, sir.

Q. Back in August of 1954 was that your same job? Was your job the same?

[fol. 794] A. Yes, sir, I was working the same hours at that time.

Q. Where was your place of duty, did you have a particular place where you were supposed to work?

A. My particular reporting place was at Clark Avenue Yard.

Q. Clark Avenue Yard?

A. That is located underneath the Clark Avenue bridge.

Q. Mr. Giese, you are familiar, are you not, with the location of the Columbus Road bridge where it crosses the B & O tracks?

A. Yes, sir, I am.

Q. This Clark Avenue bridge which you speak of, where is that with reference to the Columbus Road bridge, what distance approximately?

A. Oh, I don't know just exact, but I think it is a distance of approximately 2½ to 3 miles.

Q. Some distance to the south?

A. It is some distance south or towards the lake.

Q. Mr. Giese, was there a time during the month of August of 1954—withdraw the question.

First of all, are you acquainted with the plaintiff in this case, Mr. James Gallick?

A. Yes, sir.

Q. Can you tell us when it was approximately that you first became acquainted with him?

A. Well, I don't know approximately the date of seniority, [fol. 795] but I worked with him in the vicinity of Clark Avenue Yard and Columbus Road Yard and Cleveland Terminal since he has been—

Q. When did that start?

A. Since he has been a brakeman.

Q. Well, it goes well—

A. I don't think it is '43 or '44, his date of seniority.

Q. Is it quite a bit of time?

A. Yes.

Q. Well in advance of 1954, isn't that so?

A. Yes.

Q. Now, sir, did there come a time in August of 1954 when you had occasion to talk with Mr. Gallick about any unusual incident which he claimed to have happened?

A. Well, we had a conversation, and it led into this—

Q. Before you tell us about the conversation, where did it take place?

A. It took place at Clark Avenue Yard, as far as I can remember.

Q. That was at your usual working place, was it?

A. That's right.

Q. How did the conversation start?

A. He had told me that he was doing some landscaping at the residence that he purchased in Parma, and he was working in shorts and no shirt, and it was warm weather [fol. 796] at the time, and he claims he had been bitten by a bug, and at the time he talked to me about it he said he was either bitten at home or at work.

Q. At the time—

A. At the time he told me about it, yes.

Q. He didn't appear to be too sure, is that right?

A. Well—

Mr. Dudnik: Objection. Just a moment, please.

Mr. Hadden: Withdraw it.

Q. Go ahead and finish up what he told you about the conversation during the course of this conversation.

A. Well, as far as I can remember, that was all of the conversation we had with the exception he said where do you live. And I says I live in Parma, and at that time I didn't even know that he had moved. I didn't know where his home was at the time, and he told me he had moved in Parma and he was doing this work.

And he said, "You live in Parma? Are you pestered with bugs?"

I said, "Oh, I don't think any more than anybody else on the street with the seasonal bugs that we have."

Q. Does that complete your answer, then, is that just about the sum and substance of it?

A. That completes, that completes the conversation as [fol. 797] far as I can recollect, and that completes my answer to your question.

Q. All right, thank you. Now, did there come a time following this occasion of which you have just spoken when you had another conversation with Mr. Gallick about the same subject, the same general subject?

A. Well, as far as I can recollect, I had another conversation with the gentlemen in this respect.

He says, "Elmer"—

Q. Before you tell us what was said on the second occasion, tell us what day it was, if you remember?

A. Well, I can't tell you what day it was.

Q. Do you remember how long following the first one?

A. As far as I can recollect, it was approximately 10 days or maybe two weeks after the first conversation I had with him.

Q. Where was the second conversation held?

A. In Clark Avenue Yard.

Q. Who started this conversation?

A. Well, we were just having a casual talk about different things, the way a person does when you are on the job, and he told me, he said, "Elmer, I remember now, I was bitten by a bug while switching cars at our Columbus Street freight house."

Q. Any other conversation about the same subject?

[fol. 798] A. Not that I can remember, no, I don't remember.

Q. Did he at any time indicate to you where on his body the supposed insect bite had taken place?

A. Well, he indicated to me that when he got this insect bite and slapped it, he said there was an insect that came out of his pant leg and fell on the ground.

Q. It was on his legs?

A. It was on his leg, yes.

Q. Are you able to recall at this time which of his two legs was indicated, if either was?

A. Well, he indicated on his right leg.

Q. That is, he made a gesture indicating?

A. Yes, he said he slapped the bug, and the bug went down through his pant leg.

Q. Is that just about all that you can recall of the second conversation, then? Anything more said?

A. That is all I can recall of the second conversation I had with him.

Q. Now, Mr. Giese, did there come a time following both of these conversations when you learned that he had laid off the job?

A. I just don't get your question.

Q. Well, there came a time, did there not, when he went to the hospital, are you aware of that?

A. Yes, I found out about that later on.

[fol. 799] Q. When was it that you first learned that he was sick?

A. Oh, it was approximately two months later I heard he was sick.

Q. What was there, sir, about these two conversations which caused you to remember them, if you can say?

A. Well, will you ask that again, sir?

Q. Yes. Maybe this will be an easier way to go about it. Did you learn at some later time when Mr. Gallick had gone to the hospital why he was in the hospital?

A. Well, about two months later I heard he had an infection and he was laying off of work.

Q. Did you ever learn, sir, that he had reported or that a report had been made to the railroad with regard to the way this infection started?

A. I heard a report had been made, yes.

Q. And what did you learn with regard to that report?

A. Well, I learned that the report was made out, that he had an infection and he was laying off and he was bit by a bug, and then it came to me the conversation I had with him.

Mr. Hadden: I think that is all.

Cross examination of Elmer Giese.

By Mr. Dudnik:

Q. Then you had two conversations with Mr. Gallick about a bug bite?

[fol. 800] A. Yes, sir.

Q. Now, I want you to do the best you can to tell me again what he said in the first conversation. First, before that—withdraw that.

When was the first conversation?

A. Well, the first conversation was some time in August he told me he was doing some—

Q. Of what year?

A. Of 1954.

Q. Can you try and give us as close to the date in August as it was?

A. No, I couldn't recollect any date because—

Q. The first of August, the 5th, the 10th, 15th, 25th, 30th?

A. I don't know. I think it was around, as far as I can recollect, it was around the middle of August.

Q. Around the middle, that would be around the 15th?

A. Yes.

Q. And that conversation was in your office?

A. It was in the vicinity of our Clark Avenue Yard.

Q. The Clark Avenue Yard is a good-sized yard, isn't it?

A. Well, it runs from Clark Avenue to what we term the west end. It is only a distance of about, oh, I would say about three-quarters of a mile.

Q. Is your office at one end of that three-quarter of a mile stretch?

[fol. 801] A. Yes, my office is underneath the Clark Avenue Bridge.

Q. Where with relation to your office was this conversation had?

A. As far as I can recollect, it was right at Clark Avenue, underneath the Clark Avenue bridge at the office.

Q. Underneath the Clark Avenue bridge, and what time?

A. Well, sir, I don't know what time it was. You have a casual conversation with somebody, and you wouldn't think of time.

Q. It is casual for you to remember which leg he slapped, is it?

A. Well, yes, absolutely it is.

Q. All right, then what time was it, sir, can you remember?

A. I couldn't pinpoint the time.

Q. Was it in the morning, 8:00 or 9:00 in the morning?

A. Oh, it could have been.

Q. It could have been?

A. That's true.

Q. Could it have been at night?

A. Well, it could have been at night. However, my hours at this particular time were from 6:30 to 2:30. Now, I might—

Q. You say it could have been at night, but your hours—

A. I might have doubled over some day, I don't know. I [fol. 802] might have worked 16 hours and he might have been working on a night trick, I wouldn't know that.

Q. It could have been at night or it could have been in the morning, is that right?

A. That's true, yes.

Q. I say, is that correct?

A. Yes.

Q. But you don't know which it was?

A. No, I wouldn't say what hour of the day it was.

Q. Now tell me what he said.

A. Well, as far as I can recollect, he told me he was working on some landscaping at his home that he purchased in Parma, and he was working in shorts and no shirt, and somewhere he had received a bug bite, either at home or at work. He didn't know at the particular time. He didn't pinpoint it down anyplace.

Q. You mean he told you he was working at home in his shorts and somewhere either at work or at home he got a bug bite?

A. Yes, that's true.

Q. Why would he tell you about working at home in his shorts and then talk about a bug bite at work, if you can explain it to me?

A. Well, I don't know. That's the way some of your casual conversations happen to go on among employees while you are on duty. You talk about your home life. You [fol. 803] talk about work. You talk about moving. You talk about different things.

Q. Those are casual conversations?

A. That's all it was at the particular time, casual conversation.

Q. But you recall those facts these years later, do you not?

A. Due to the fact—yes, I do remember, due to the fact that several months later—

Q. If I may—go ahead and finish. I am sorry. Finish. I didn't want to interrupt you. Are you finished?

I started to interrupt you.

A. You stopped me.

Q. I am sorry. Go ahead.

A. I will leave it up to you now. I don't know what we were talking about.

Mr. Hadden: Do you want to read the start of his answer?

A. You will have to read that back.

(The following answer was read by the reporter:)

"Due to the fact—yes, I do remember, due to the fact that several months later—"

A. Several months later the man reported off sick, and then this here conversation came back to me that I had with him.

Q. Was it after he reported off sick that the first conversation came back to you?

[fol. 804] A. After he reported off sick?

Q. Yes.

A. Yes, after he reported sick, then it came back to me, the conversation I had.

Q. Which, the first one?

A. Yes, sir.

Q. When did the second conversation come back to you?

A. At the same time I would say.

Q. At the same time the first one came back to you?

A. That's right.

Q. Now, did he brush his leg like this at the first conversation?

A. No, he brushed his leg like this at the second conversation.

Q. How did he brush his leg at the first conversation?

Mr. Leasure: I will object to that.

Q. If there was a brushing of the leg.

Mr. Leasure: Yes. It assumes something that is not in evidence.

A. I will answer that. There was no brushing of the leg on the first conversation.

Q. Now, then, stand up, please, again, and show the jury exactly the motion he made when he made it.

(Witness demonstrates.)

Q. That is the way he did it?

[fol. 805] A. That's true.

Q. When did he tell you the bug rolled down his pant leg?

A. At the time he had the second conversation, and he had demonstrated to me the way he killed the bug.

Q. What did he tell you the first time about what happened to the bug, whether it rolled down his leg or not?

A. He didn't say anything about it the first time, the first conversation I had with him, that he slapped the bug.

Q. And those conversations were how far apart?

A. Oh, I don't know. I would say approximately a week or 10 days.

Q. A week or 10 days apart, you don't know whether the first one happened in the daytime, morning, or nighttime, but you worked from 6:00 to 2:00 that month, is that right?

A. That's right, I worked from 6:30 to 2:30.

Q. When did the second conversation take place with relation to whether it was morning or night?

A. Well, I wouldn't know the hour of the day, sir.

Q. Well, again I ask you—

A. I wouldn't remember the hour of the day.

Q. Can you remember whether it was in the morning or at night?

A. Either in the morning or afternoon. I wouldn't say too much about night, because my hours were 6:30 to 2:30.

Q. Well, will you swear that it wasn't at night?

[fol. 806] A. I am almost positive it wasn't at night, because I say my hours were 6:30 to 2:30.

Q. Now, that is the second conversation, is that right?

A. That's true, yes.

Q. At that time there was no question in your mind that this had happened at work, was there?

Mr. Leasure: I think I will object to that, your Honor. All he can relate is the conversation.

Mr. Dudnik: Well, I will withdraw that if it is objectionable.

Q. At that time there was no question in your mind but what he told you it happened at work, the second time?
A. The second time he told me it happened at work, yes.
Q. And at that time did he tell you this bug rolled down his pant leg?
A. That's what he said, yes.
Q. And you knew it happened at work?

Mr. Leasure: I will object to that.

Q. From what he said. I will withdraw that. You knew that he said it happened at work, right?
A. He said, the second conversation he told me that now he remembers he slammed the bug on the side of his pant leg and it fell down on the ground.
Q. At work?
[fol. 807] A. At work.
Q. Right?
A. That's right.
Q. You were his superior, were you not?
A. That's true.
Q. Being the yardmaster?
A. Yes.
Q. You were his superior, were you not?
A. Yes, sir.
Q. Did you ask him to make a report of this incident when he told you about it the second time?

Mr. Leasure: I will object to that, your Honor, on the ground it is irrelevant.

The Court: We have been talking about reports here. He may answer.

A. Will you word it again, sir?

Mr. Dudnik: Read the question.

(Last question was read by the reporter.)

A. Did I—
Q. Do you want the question read again?

A. Yes, I want it read again. It didn't sink in. Read it again.

(Same question was read by the reporter.)

A. We have a poster at our various offices stating that when a man becomes injured he will when physically able [fol. 808] to do so report the condition to his superior officer, and make a report.

These reports or set forms are on hand for this purpose throughout the railroad yard office, when they are required by any person or persons, and in this case this man did not ask me to make a report or to assist him in making a personal injury report covering the conversation in regard to a bug bite.

Mr. Dudnik: Your Honor, I ask that the answer be stricken as not responsive. If I may ask, your Honor, before ruling—

The Court: I remember the question.

Mr. Leasure: It certainly is responsive, your Honor. It is the exact subject inquired about.

The Court: I think the question was did you ask this plaintiff to make a report?

Mr. Dudnik: That's right.

Mr. Leasure: I think, if your Honor please, the answer indicates that there is no duty on the supervisor to request the employee to make a report.

Mr. Dudnik: Do you think, your Honor, it is necessary for Mr. Leasure to make a jury speech?

[fol. 809] Mr. Leasure: Well, he is explaining. It is posted in writing.

The Court: Just a minute. I will rule on this. The question was asked of this witness, did you ask the plaintiff to make a report?

It is the Court's ruling that the answer was not responsive. The answer will go out, and the reporter may read the question once more, and then respond to the question as it is asked, sir.

Mr. Leasure: Note an exception.

(The following question was read by the reporter:)

"Did you ask him to make a report of this incident when he told you about it the second time?"

Mr. Dudnik: Answer that yes or no.

Mr. Leasure: I object. He should be allowed to explain his answer.

The Court: He may answer yes or no. If you can't answer yes or no, then qualify your yes or no.

A. No, I didn't tell him to make a report of it, and—

Q. Have you finished your answer?

A. Sir?

Q. Have you finished the answer?

A. Yes. That's all I could say about that.

[fol. 810] Q. What if anything did you do about him telling you of the incident happening at work, that is, what did you do about it?

A. I didn't do anything about it. The man continued working and I didn't think there was anything wrong with him. That's one reason I didn't ask him to make a report.

Q. Oh, is that why you didn't ask him to make a report?

A. I didn't think there was anything wrong with him.

Q. Fine. What type of injury do you have to report on your railroad?

A. You report all injuries on the railroad, no matter how slight they are.

Q. Fine. Well, wasn't this—didn't you learn then that he had a slight injury when he told you about this condition?

Mr. Leasure: I think I will object, your Honor.

Mr. Dudnik: Just a moment. If your Honor please, I think—

Mr. Leasure: The question I think involves—

Mr. Dudnik: I don't think we need a reason, unless your Honor requires a reason. I don't think a reason for an objection should be given.

Mr. Leasure: Objection.

[fol. 811] The Court: Objection overruled.

Mr. Leasure: Guessing—

Mr. Dudnik: The Court isn't guessing. You may be talking, but the Court isn't guessing. I resent that implication.

Mr. Leasure: You can resent all you want to. In Federal Court we have to give reasons.

Mr. Dudnik: You are not in Federal Court, sir, and this Court knows the law.

Mr. Leasure: And in state courts we are entitled to give reasons if we desire, as you well know.

The Court: If there are any questions you want to take up with the Court, you will take them up with the Court and there will be no argument between counsel.

Mr. Dudnik: I am sorry, your Honor.

Q. Read the question.

A. What is the question, sir?

(Following question was read by the reporter:)

"Didn't you learn then that he had a slight injury when he told you about this condition?"

A. No, I didn't think it was an injury to report, due to the fact that he did not make an issue of it or press it that he wanted to make a report.

[fol. 812] Q. But do we agree that all reports of injuries must be made no matter how slight?

A. That's true.

Q. And did you know that at the time?

A. Yes, absolutely.

Q. What is the rule where one of your subordinates—he was a subordinate of yours, wasn't he?

A. That's true.

Q. What is the rule where one of your subordinates doesn't make a report, what do you do about it if you think one ought to be made?

A. I suppose you would criticize him.

Q. Sure you would. Did you criticize him? My question is did you criticize Mr. Gallick for not making a report?

A. No, I did not.

Q. And you didn't make one yourself either, did you?

A. No.

Q. And yet he told you about this thing twice, did he not?

A. That's true.

Q. Well, when did you next do anything about this bug bite that you heard Mr. Gallick speak of?

A. When did I do—what did I do next?

Q. Yes, what if anything did you do next about this bug bite?

A. What time are you talking about, from—

[fol. 813] Q. Next after the second conversation, give it to me in sequence, what did you do next?

Mr. Leasure: I will object.

Q. With relation to the bug bite.

Mr. Leasure: Just a moment. I will object, if I may state a reason.

The Court: You may state your reason.

Mr. Leasure: I trust it will be helpful to the Court. The question assumes that something was done next. That hasn't been established.

Mr. Dudnik: I said what if anything, your Honor.

Mr. Leasure: Oh, I didn't hear that. Read the question back.

(The following question was read by the reporter:)

"Next after the second conversation, give it to me in sequence, what did you do next?"

Mr. Dudnik: Read the one before that.

(The following question was read by the reporter:)

"What if anything did you do next about this bug bite?"

[fol. 814] Mr. Leasure: Which one do you want him to answer?

Mr. Dudnik: I will rephrase it. They are all the same question, Mr. Leasure, but apparently I will start from the beginning.

Q. What if anything did you do after the second conversation about the information you had with relation to Mr. Gallick's bug bite? Do you understand that question?

A. I didn't do anything.

Q. Did you talk to anybody about it after that?

A. No, sir, I did not.

Q. Did you talk to anybody recently about it?

A. I did recently, yes.

Q. When?

A. Oh, possible two weeks ago.

Q. Two weeks ago?
A. Yes.
Q. And how about before two weeks ago?
A. No.
Q. You are sure of that?
A. Yes.
Q. So that from about the middle of August of 1954 until about the first of June of 1959 you talked to nobody about the conversation that you had with Mr. Gallick?
[fol. 815] A. That's right.
Q. Do you know that an accident report had been made out about Mr. Gallick's bug bite within two or three months after it happened?
A. Yes, I knew that later on an accident report was made out on it, yes.
Q. When did you learn about it?
A. Oh, sometime in October when the report was made out.
Q. Fine. May I have the exhibit?
In October of 1954 you learned that an accident report had been made out, did you not?
A. Yes.
Q. Who did you learn it from?
A. My superior officer.
Q. Who is your superior officer? Which particular superior officer?
A. Mr. Gordon at the time.
Q. What was his job?
A. His job was terminal trainmaster.
Q. You learned it from him?
A. Yes, sir.
Q. Now, will you tell me, please, the conversation you had with Mr. Gordon about this report?
A. All that he told me, that a 790 was submitted covering a bug bite which Mr. Gallick had received, and it was on his [fol. 816] desk, and he had to go through the formality of mailing it to the superintendent.
Q. What did you tell him?
A. I didn't tell him anything.
Q. Didn't you at that time within two to three months after you had this conversation with Mr. Gallick, and you

heard a 790 report had been made out, and you heard that from your superior officer, didn't you tell him what you are telling this jury today?

A. No.

Q. You did not?

A. No, sir.

Mr. Dudnik: Thank you.

Redirect examination of Elmer Giese.

By Mr. Hadden:

Q. I have one or two questions. You used the phrase doubling over; what does that mean, sir?

A. That means working two tricks, from 6:30 to 2:30, and 2:30 to 10:30, when they are short of supervision.

Q. That would be 16 consecutive hours, approximately?

A. That would be 16 consecutive hours, yes.

Q. And did you on any occasion during the month of August of 1954 double over in that manner, if you can remember?

A. Yes, sir, I did. During summer months when they are short of men on vacation, going on vacation, then you [fol. 817] usually have a chance of doubling.

Q. Mr. Giese, when you talked about the second conversation, you mentioned that Mr. Gallick I believe it was said that he had been bitten near the Columbus Road freight house, is that right?

A. That's right.

Q. How far is that, sir, from the Columbus Road bridge?

A. Well, I would say number one house to the bridge, the Columbus Road bridge, is approximately around eight or nine hundred feet possibly.

Q. During the course of either of your conversations with him did you learn of anything from Mr. Gallick that led you to believe that this insect bite was an injury?

Mr. Dudnik: Objection.

Mr. Hadden: The point has been raised by you, Mr. Dudnik.

Mr. Dudnik: The only thing is—

The Court: Will you read that question?

(Last question was read by the reporter.)

The Court: Objection sustained.

Q. Mr. Giese, in the course of your experience, 40 years with the B & O, sir, have you ever heard of anyone reporting an insect bite on a form 790?

Mr. Dudnik: Objection.

[fol. 818] The Court: He may answer that.

A. That's the first time in my experience.

Q. One last question. Do you have anything to do in the course of your duties as a yardmaster with the handling of claims by employees for personal injury?

Mr. Dudnik: May I have that question read?

(The last question was read by the reporter.)

A. No, I don't have anything to do with that.

Mr. Hadden: That is all.

Recross examination of Elmer Giese.

By Mr. Dudnik:

Q. As a matter of fact, I understood you to say that if a man doesn't make a report out, you criticize him?

Mr. Leasure: Just a moment.

A. No, you didn't say report, you didn't say report, you didn't say an injury report.

Mr. Leasure: Just a moment.

A. You was talking about report forms.

Mr. Leasure: Just a moment. That was not established at all, Mr. Dudnik assumes—

A. It was not an injury report question.

Q. Did you say you didn't criticize him, if they don't make reports?

A. That question you raised before, you was talking [fol. 819] about reports. You did not say injury reports. We make various reports on the railroad, hundreds of them.

Q. Then I was mistaken, sir. All right.

If a man doesn't make out an injury report when he should make one out, do you criticize him?

A. Well, only in this respect; that he was injured, he reported off injured, we have to have an injury report to cover this, let's get this thing made out now.

Q. And that is your responsibility, isn't it?

A. That is part of my responsibility, yes, sir, as a yard man.

Q. So you do have something to do with injury reports, do you not?

A. Only in making them out. Not to process them.

Q. Now, after you had your conversation with Mr. Gordon—

Mr. Hadden: Who?

Mr. Nurenberg: Gordon.

Q. Gordon, is that the man's name, your superior?

A. Yes, at the time.

Q. That was late in 1954; between then and about the first of June of '59 you spoke to nobody about this, is that your answer?

A. That's true.

Q. And did any body speak to you about it in that interim?

A. No, not that I can recall.

[fol. 820] Q. Now, tell us who since the first of June of this year you spoke to about it?

A. Just the Baltimore and Ohio Railroad attorneys.

Q. Well, are you referring to these two gentlemen?

A. Yes, sir.

Q. Anyone else?

A. Not that I can recall.

Q. You just recall these two gentlemen?

A. Yes, these here two gentlemen here.

Q. How about Mr. Glenn, didn't you talk to him?

A. Oh, well, he was up there at the room, yes, when I was up there talking to the B & O attorneys, yes.

Q. Did you talk to Mr. Glenn about it?

A. Not personally, no. But he was there.

Q. How about Mr. Williams?

A. Oh, I only met Mr. Williams once. He is a B & O Claim Agent, I believe?

Q. That's right.

A. He was there one evening when I was required to report up there.

Q. How many separate times did you talk to people about this case?

A. Three or four—four times, I think.

Q. Four times?

A. Yes.

[fol. 821] Q. Four different days?

A. Yes.

Q. Were all the conversations had in the lawyer's office?

A. Yes, sir.

Q. Now, who told you about going to the lawyer's office?

A. My superior officer at the present time, Mr. Fleming.

Q. Now tell me what he told you, sir.

Mr. Leasure: I think I will object to this, your Honor. Certainly we are way beyond the bounds of relevancy here.

The Court: Objection sustained.

Mr. Dudnik: No further questions.

Mr. Hadden: You may step down.

We should like at this time, your Honor, to offer our exhibits in evidence.

(Defendant's Exhibits L and M were marked for identification by the reporter.)

Offers in Evidence

Mr. Hadden: Your Honor, we should like at this time to offer the reports of Dr. Heller, his office file, that is marked Defendant's Exhibits A, B, C, D, E and F.

All the other exhibits except Defendant's Exhibit J, K, L, and M have been received according to the reporter's notes. I should like to offer those at this time. Exhibits J, K, L and M remain to be offered, Defendant's Exhibit [fol. 822] J being the City of Cleveland sewer map; Defendant's Exhibit K being a smaller sewer map, and Defendant's Exhibit L and M being respectively two photographs showing the B & O property lines in the vicinity of the Columbus Road bridge, that is Exhibit L; Exhibit

M being a larger photograph showing the Columbus Road bridge and also the entire downtown area of Cleveland with the B & O property lines in colored ink on it.

The Court: I have Exhibits A through F, and J, K, L and M.

Mr. Hadden: That's right, the intervening ones have already been offered as part of the Plaintiff's case.

The Court: Without objection they will be received.

Mr. Dudnik: No objection.

Mr. Leasure: At this time, your Honor, may I simply hold up in front of the jury Defendant's Exhibit L and point out to them what it is, and when they are in their jury room they can look at it more closely.

This is an aerial photograph of the flats area, including Columbus Road bridge.

The red lines show the limits of the B & O property, [fol. 823] in that area. Where there are buildings appearing such as over here the lines intend to look through the building, so the fact that a line may appear to include a building does not mean that the building is on the B & O right-of-way. The line is looking through the building down to the ground. The only exception on this exhibit, which is not marked off by lines is Lime Road which goes from Columbus Road down to the plants here in this area including Mau-Sherwood, and so forth.

The person drawing this map did not draw in the red lines to show that Lime Road is not B & O property, as he should have done.

Otherwise, the drawing is complete, and by looking at it you can observe where the B & O property is in that area, and where it is not.

And I call your particular attention to Columbus Road bridge here at this point where I am pointing, you will notice that the property line narrows in there, so that it runs alongside what appears to be each edge of the bridge, and then broadens out on the one side and goes straight on the other side.

Defendant's Exhibit M is a large aerial photograph which is larger than the one presented by the plaintiff, [fol. 824] and it also has certain colored lines on it, which may not be visible to you from this distance.

But the legend of those lines appears in the upper left-hand corner.

Once again the red line shows the property line of the Baltimore and Ohio Railroad in this entire area.

So if any question comes up as to what property they own or did not own, it shows on this photograph.

The area in the lower right-hand section of the photograph where I have my finger, and enclosed in red lines, is the Clark Avenue yard which has been referred to here many times in the evidence. Keep this place in mind.

I will point to a very small circle here where my finger is, this is the Columbus Road bridge.

I think you can see in this photograph the Cuyahoga River which runs a meandering course in this manner here, and out to the lake.

The yellow lines which are all circular lines, show one-half mile concentric circles, starting from the Columbus Road bridge here, where I have my finger, so that this circle is a half mile.

[fol. 825] Of course, the second one is a mile, and the third one a mile and a half.

The green lines show property owned by the Baltimore and Ohio, but leased to others and not controlled by the Baltimore and Ohio.

The black line, I think it is black, let's see, I think it is supposed to be dark blue, at least this legend here is property owned by others but leased to the Baltimore and Ohio Railroad and controlled by the Baltimore and Ohio.

So if any question comes up about who owns what property, this aerial map as marked should be of help.

I think we will have this marked, too, in the interest of complete necessity. That is the blueprint of the tracks and the property area.

Mr. Dudnik: If you don't know the lines, how is the jury going to know?

Mr. Leasure: Except as related here. Well, we better have this marked.

(Defendant's Exhibit N was marked for identification by the reporter.)

Mr. Leasure: At this time the defendant offers Defendant's Exhibit N, your Honor, which is a so-called track [fol. 826] station map of the Baltimore and Ohio Railroad

Company, which shows the area here in question, including Columbus Road bridge, as well as other area adjacent thereto. It is in the form of a blueprint.

The Court: Without objection it may be received.

Mr. Leasure: Then one last thing, members of the jury, and again without passing this around, this is a blueprint which shows the area in the general vicinity of Columbus Road bridge, showing Columbus Road, Columbus Road being marked here at this location, and running up this way generally.

And I take this point here to be the bridge.

Once again the red lines show the property lines of the Baltimore and Ohio Railroad Company. This map here does show Lime Street, it is called here, and once again the man making this did not draw red lines down Lime Street, although it is a public road and not owned and controlled by the Baltimore and Ohio.

But at least it is marked there so you can see where it is as well as all the other streets.

This also includes a diagram of the various factories in the area with their names marked on, such as Mau [fol. 827] Sherwood, Sherwin-Williams, and other locations which have been referred to here in the evidence.

The defendant rests.

Thereupon the defendant rested.

[fol. 828] **Rebuttal**

Thereupon the plaintiff, further to maintain the issues on his part to be maintained, and to rebut the testimony adduced on behalf of the defendant, called as a witness Leon Plevin, who, being first duly sworn, was examined and testified as follows:

Direct examination of Leon Plevin.

By Mr. Dudnik:

Q. I want you to talk loudly and clearly so all these folks can hear you.

Give us your name in full.

A. Leon M. Plevin.
Q. Spell your last name?
A. P as in Paul, l-e-v-i-n.
Q. Where do you live?
A. 1215 Ranchland Drive, Mayfield Heights, Ohio.
Q. Are you a family man?
A. I am.
Q. How old are you?
A. Twenty-seven.
Q. What is your profession or occupation?
A. Lawyer.
Q. You are associated with me in my office?
[fol. 829] A. Yes, sir.
Q. Where did you go to law school?
A. Cleveland Marshall Law School.
Q. My alma mater. When did you graduate?
A. In June of 1957.
Q. Had you been with me before you graduated?
A. Yes, approximately two years before graduation.
Q. What did you do in my office for me before you graduated from law school?
A. Leg man. Checked dockets, medical reports, and examinations, and so forth.
Q. Did you also do investigating work?
A. Yes, I did, sir.
Q. Have you been practicing law since 1957 with me?
A. I have, sir.
Q. Leon, tell me, as part of your practice have you done investigating for me?
A. I have.
Q. What instructions have you had from me as to how to take a statement from a witness?

Mr. Leasure: We will object to this, your Honor.
The Court: Objection sustained.

Q. Did you at my request do some investigative work on the case of James Gallick versus the Baltimore and Ohio Railroad?
[fol. 830] A. I have.
Q. And did you at my request take statements from witnesses in connection with that case?

A. I have.

Q. Was one of those statements obtained from a man by the name of Benedict Brodzinski?

A. That's right, sir.

Q. Do you recall when you saw him?

A. A week ago Saturday, in the evening.

Q. When did you get his name with regard to seeing him?

A. Approximately Saturday afternoon.

Q. From whom did you get it?

A. From you, sir.

Q. What were your instructions when you went out to see him?

Mr. Leasure: I will object to that.

Mr. Dudnik: I will withdraw it.

Q. Then, to get right down to the question, tell us whether or not you took a signed statement from Mr. Brodzinski?

A. I did.

Q. Tell us whether or not you put in that signed statement all of the facts which he gave you?

Mr. Leasure: I object to the leading question.

The Court: Rephrase the question, please.

[fol. 831] Q. What did you do with relation to taking that statement, tell the jury in your own words?

A. Well, I went to his home and engaged in general conversation, told him who I was, and so forth, and told him I would like to speak to him about Jim Gallick's accident.

And we conversed for a period of time, and I said fine, I would like to write this down, and I took out a yellow pad that all lawyers use, and I took a 4-page statement which was what he had told me, and I put it down in as concise language as possible, and requested him to sign that statement, which he did so.

Q. Tell us whether or not in this conversation that you had with him before taking the statement, during taking the statement, or after taking the statement, whether or not he said to you anything about Gallick having told him he was cut by a sliver.

Mr. Leasure: Objection.

A. No, he did not, sir.

The Court: He may answer.

Q. He didn't?

A. He did not.

Q. If he had told you that would you have put it in the statement?

Mr. Leasure: Objection.

The Court: He may answer.

[fol. 832] A. I would have, sir.

Q. Did you give him a card before you went into conversation with him about the case?

A. Oh, yes. When I walked into his home I told him I am Mr. Plevin, I am checking into this accident, I wondered if he might speak to me. And he said who are you, and I said I am an attorney.

And he said who do you represent over here, and I said I represent Mr. Gallick.

And he said are you from Mr. Dudnik's office, and I said I was.

He said what is your name again, and I said Plevin.

And he had some difficulty pronouncing it and I took out a card from my wallet and I handed it to him, which has Mr. Dudnik's name on the card, and my name in the corner of it, of the card.

Q. Do you remember taking a statement from Mr. Corrigan?

A. I do, sir.

Q. Do you remember in that statement him telling you of a rumor he heard as to—

Mr. Leasure: Just a moment. I think I will object to this.

Mr. Dudnik: You wanted to know about Mr. Plevin, and who was this mysterious Mr. Plevin. Here he is and you can cross-examine him.

[fol. 833] Mr. Leasure: I don't see where this is relevant at all.

(Thereupon court and counsel conferred at the bench outside the hearing of the jury.)

Mr. Dudnik: You may now have Mr. Plevin.

Mr. Leasure: Thank you very much.

Mr. Dudnik: Just a moment, please, if I may.

By Mr. Dudnik:

Q. In taking that statement from Mr. Brodzinski, did you write the whole thing out before he read it or did you do it in another manner?

A. No, I engaged him in general conversation, finding out what he knew about the facts and situation involving Mr. Gallick. And then—in fact, he brought over a table, a little end table for me, and I put my tablet on the end table and wrote out a 4-page printed statement, at which time I said I wondered if you might go over this and read it.

We were in the living room at that time. And he took us into his kitchen, and we sat down at his kitchen table and I handed it to him and he read the 4-page statement.

In fact, let's see, 4 pages, I remember on the third page that there was some question as to the wording which he didn't prefer or care for, and there were instances which I [fol. 834] crossed out wording which he didn't care for, and I put in additional phrases or words concerning the statement which he signed each correction, and then he signed each page, and I think at the end he also signed the statement.

Mr. Dudnik: That is all.

Cross examination of Leon Plevin.

By Mr. Leasure:

Mr. Leasure: May I have the statement?

Mr. Dudnik: Yes.

Q. Mr. Plevin, you are on Mr. Dudnik's payroll, is that correct?

A. That's correct, sir.

Q. And you have been for how long now?

A. Four years this past June.

Q. In other words, you are employed by him?

A. That's correct, sir.

Q. He can terminate your services any time he desires?

A. I imagine so.

Q. You say you are a family man, married, with children?

A. Correct, family, two children.

Q. Now, what did you do previous to going to work for Mr. Dudnik?

A. I was working at the First National Credit Bureau.

Q. And then you went with Mr. Dudnik what, four years as an investigator?

[fol. 835] A. On June 14, 1955.

Q. Then you took law work and passed the Bar about two years ago?

A. Yes, I passed the Bar in August of '57.

Q. So you have been a practicing lawyer almost two years now?

A. Two years.

Q. Now, I suppose in the time that you worked for Mr. Dudnik you have taken many statements from witnesses, have you?

A. I have taken statements, sir.

Q. Will you tell us how many different ways there are to take statements from witnesses, in your experience, Mr. Plevin?

A. Well, I only consider there to be one way to take a statement.

Q. My question may not be clear. You can take a statement which you yourself write out, that is one form.

A. I understand what you mean, yes. Handwritten statement and also stenographic statement.

Q. In other words, if you want to get down everything that the person has to say in exactly their own words, you take along a court reporter, or someone of that kind who takes it down like this man is doing here, isn't that correct?

A. That would reflect the question-and-answer type of statement.

Q. That's right, and in that way you get the person's own words and his own phraseology, don't you?

[fol. 836] A. I imagine so.

Q. Well, you know, sir, don't you?

A. Yes, that would be correct.

Q. Because that is exactly what he says, isn't it?

A. Sure.

Q. And it includes everything he says, doesn't it?

A. That's correct.

Q. There is no doubt about it, then?

A. No doubt.

Q. You didn't do that in the case of Mr. Brodzinski's interview, though, did you?

A. No, I did not.

Q. You have done that, have you not, in other cases where you have investigated and talked to witnesses?

A. No. Most of the cases that I have investigated I usually take a handwritten statement. There are occasions when I have taken stenographic statements.

Q. You know Mr. Dudnik often has—whether you are taking it or somebody else from his office is taking it has a reporter there and taking everything down, you know that, don't you?

A. In what fashion, in what manner, sir?

Q. Well, if you go out to somebody's house, particularly during the course of a lawsuit, you know that he often has a court reporter to go along so that everything is taken [fol. 837] down, don't you?

A. No, I don't know that.

Q. You don't know that?

A. No.

Q. Do you deny it?

A. Deny that Mr. Dudnik takes a statement?

Q. Or others in your office take statements that way?

A. Not conclusively.

Q. You say you usually do it in this method here on a yellow pad in your own handwriting?

A. The majority of the time I take a handwritten statement.

Q. Now, when you went out to see Mr. Brodzinski, you knew this case was in the process of trial, did you?

A. I did, sir.

Q. You knew it was important, didn't you, that you get down everything he had to say about it?

A. I imagine, yes, I would say so.

Q. And you still didn't take a court reporter with you?

A. No, I did not.

Q. Are you in the habit of taking undated statements, Mr. Plevin?

A. I imagine almost all my statements—well, in fact, I only take a statement and put down the facts that they tell me. I don't think I ever dated a statement.

Q. Is that part of your technique, not to date a statement?

[fol. 838] A. Well, I don't see frankly, it doesn't have much to do with the case at all.

Q. Don't you think a witness some time later would like to know or you yourself would like to know the exact date that you took the statement?

A. I am only interested in the facts of the case and the truth of the matter, and I don't think the date is at all important, sir.

Q. One of the facts of the situation is the date that you go to see him, isn't it?

A. Not essentially, no, I don't believe so at all.

Q. Then you make a practice of not putting any date on your statements, is that what we are to understand?

A. That's correct, I do not date any statement. I may be right or wrong, I don't know, but I don't do it.

Q. Now, I take it, am I correct in assuming this, that when you go and talk to a witness, particularly during the course of a trial, that you are very careful that you put down everything that he says that may favor your side of the case?

A. No, no, sir, that is incorrect.

Q. Do you say you don't put everything down that he says that favors your side of the case?

A. That's correct, sir. I am only interested in the truth.

Q. Well, is there some distinction here between the truth and that which favors your side of the case? I don't follow [fol. 839] you.

Mr. Dudnik: Your Honor, just a moment. There is an objection and it is a very unfair question.

The Court: Objection sustained.

Q. Are we to understand then that you don't put in your statement the substance of everything the man tells you?

A. No, that is wrong. I do put in the substance of everything the man does tell me.

Q. So then you put in everything he tells you that favors your side of the case, is that correct?

A. Whether it is beneficial or detrimental makes no difference. We are interested in knowing what our position is going to be in the matter.

Q. Now, you knew, did you not, what use was going to be made of this statement that you took of Mr. Brodzinski? You knew what the purpose of your going out there was, didn't you?

A. Yes.

Q. You knew that this case was in the course of trial, didn't you?

A. Certainly.

Q. And you had some indication, did you not, that we might call Mr. Brodzinski here as a witness, didn't you?

A. Not as a probability. Perhaps as a possibility. I had [fol. 840] no actual knowledge that he was going to be called.

Q. And you wanted to get a statement from him that you might use in cross-examination, isn't that correct?

A. We wanted to know what he would have to say about this matter, as I have done in the past statements taken.

Q. All right. How long were you there, from the time you first got there until you finally left?

A. Well, I remember leaving the house, I would estimate offhand I got there approximately quarter to eight in the evening.

Q. How long were you there, that was my question.

A. How long was I there?

Q. Yes.

A. From approximately quarter to eight to about a quarter after nine, maybe twenty after nine, twenty-five

after nine. Approximately an hour and a half to an hour and forty-five minutes.

Q. How much of that time would you say was spent talking about what he knew about this case?

A. Oh, I would say I engaged him in conversation for approximately 20 minutes or so, somewhere in that vicinity. I can't be absolutely sure. Maybe a little longer. We talked about many things.

Q. How long were you there before you started talking about this case?

[fol. 841] A. Well, I think—when I first entered his home I told him who I was and what I was out to talk to him about, and he got into the subject of the case immediately.

Q. Can we agree with this, that as a result of an hour and a half's conversation we end up with a 4-page statement written by you?

A. Well, you mean as a result of being there for an hour and a half, but not an hour and a half conversation, no. I was there a total of maybe an hour and a half or longer.

Q. That is why I asked you how long you spent talking about this case. You talked about the weather and so forth?

A. Actually, regarding this case, I would say approximately in the vicinity of 20 minutes or so, conversing. It may have been longer. It could have been a half hour. I am not exactly sure.

Q. You mean that you spent an hour or hour and ten minutes talking about things entirely unrelated to this case?

A. No, it took me a considerable period of time to print out 4 pages.

Q. And did you keep talking to him off and on as you were printing it out, or did you just start and print it all the way through without further conversation?

A. Oh no, I would try to organize the statement as best as possible in orderly fashion. And as I recall, I may have spoken to him to give him the idea of what I was putting [fol. 842] down in the statement, whether or not those were his thoughts. Generally speaking that would be the way I did take down the statement.

Q. But whatever is said here was your choice of language, wasn't it?

A. No. Some of that is his choice of language. Some of it he had to explain to me which I didn't understand.

Q. Did he dictate any of this to you?

A. No. That was his thinking as reflected in my writing.

Q. In other words, what he said went through your brain, down your arm, and you wrote it out, is that it?

A. If you want to look at it from that point, yes.

Q. Mr. Plevin, when you talked to him weren't you interested in finding out for example whether he had ever been bitten by an insect on this job down there?

A. Would you please repeat the question?

Q. Weren't you interested in finding out from him whether he had ever been bitten by an insect while working on this Seneca Street job or downtown job?

A. No, I didn't think it important, because I was asking him about what he knew about Jim Gallick. That was the subject of my visit, to find out what he knew about Mr. Gallick.

Q. You asked him a lot of things, didn't you, about his experiences on the job down there, not Gallick's, I mean [fol. 843] Brodzinski's experience on the job?

A. As to what, sir.

Q. Well, as to about twelve things in the statement. Don't ask me what. The things you have got in the statement here. It isn't all about Jim Gallick itself; a lot of it is about Brodzinski's knowledge of the job?

A. Oh, yes, that's true.

Q. Certainly. Weren't you interested in finding out from Mr. Brodzinski whether he had ever had an experience like Mr. Gallick claims to have had while working on that job?

A. I perhaps just didn't even think of it at that time.

Q. You just didn't even think of it?

A. No, I didn't, sir.

Q. At least it didn't get in the statement, anyway?

A. Well, if it isn't—it isn't there, so it didn't get in the statement.

Q. Weren't you interested in finding out whether Mr. Brodzinski knew of anybody else who might have had a similar experience as this?

A. No, I didn't think of that phase of the case at all, sir. No, I didn't.

Q. Who else was present there at your conversation with Mr. Brodzinski?

A. Mr. Brodzinski and I were in the living room, and I believe his wife was seated in the kitchen.

[fol. 844] Q. I think you said that you and he went into the kitchen?

A. And she went into the living room. She didn't interfere in the business that we had between the two of us.

Q. She was in a position, was she not, to overhear what was said?

A. Maybe phrases. I doubt it sincerely. The television set was on, at a certain volume. I don't know if she could have heard what we were saying all the way in the kitchen or not.

Q. As a matter of fact, you asked her how to spell certain words, did you not?

A. Yes, I misspelled I think the word pigeons.

Q. You asked her how to spell it?

A. Yes, that's right. I said, "How would you spell it?"

Q. All right. So she was there close by at least, is that correct?

A. Yes, I called into the kitchen and asked her that.

Q. Are you telling us then that she was not in a position to overhear what Mr. Brodzinski told you about his conversation with Mr. Gallick?

A. As an opinion, I don't think she was.

Q. You don't think so?

A. I don't believe so, no.

Q. Where were you and Mr. Brodzinski when Mr. Brodzinski told you about his conversation with Mr. Gallick?

A. Where were we?

[fol. 845] Q. Yes.

A. Mr. Brodzinski and I were in the living room, sir.

Q. Was that early or late in your conversation with him?

A. That was I would say within a few minutes after I had arrived.

Q. Was reference made to it then later on with reference to the conversation?

A. With reference to what, sir?

Q. To the conversation Mr. Brodzinski had with Mr. Gallick?

A. Oh, maybe as I was writing, it may have. I am not too sure. I don't recall that now. I imagine it probably could have been. I don't know.

Q. During this entire conversation you had with Mr. Brodzinski before you started writing, did you make any notes as you went along so that you could remember later on just what was said?

A. I think I had a piece of scratch paper there that I may have written down a word like pigeons that he told me, or slipping, because I didn't understand the phraseology he said something about—

Q. Where—

Mr. Dudnik: Let him finish, please.

Mr. Leasure: No.

Mr. Dudnik: Let him finish, please.

Mr. Leasure: He is way beyond answering my question. [fol. 846] I asked him whether he made any notes. Very simple. Either he did or he didn't.

A. Yes, it was on a piece of scratch pad.

Q. Where are those notes?

A. I don't have that, sir.

Q. What did you do with it?

A. When I was through with the statement I threw it out.

Q. You threw it away, all right.

A. It wasn't actually notes. It was phrases.

Q. All right. So it helped you pick up later on what he had said?

A. Yes, because there was some of it I didn't understand what he was talking about.

Q. In your experience as an investigator, Mr. Plevin, after you have a conversation with a person, whether it is 20 minutes or half an hour or whatever it may be, about a particular case, you find the notes that you make during the conversation help you to write out a full and accurate statement, isn't that correct?

A. By referring to it, to have it organized properly, yes, I would say yes to that point.

Q. And you did make such notes in this instance?

A. It was not notes. It may have been two or three

words jotted down to inquire, as I was writing the statement.

Q. Whatever it was, you destroyed it and you do not have [fol. 847] it here today?

A. Oh, yes, I don't keep that.

Q. Now, isn't this a fact, Mr. Plevin, and I want you to think very carefully before you answer, isn't this a fact, that when Mr. Brodzinski told you about his conversation with Mr. Gallick, he told you that Mr. Gallick told him that he had this place on his leg and he didn't know whether he got it from a bug bite or from a splinter or sliver, whatever the word might have been, on a car, and thereupon you repeated that statement in substance and that was overheard by Mrs. Brodzinski?

A. No, I didn't, sir.

Q. You didn't what?

A. I didn't repeat anything like that, and I didn't hear anything like that.

Q. Do you deny that Mr. Brodzinski said anything like that, or are you telling us you just didn't hear it?

A. I would have to say he didn't say it.

Q. You are telling us that now as your carefully considered statement?

A. Yes, sir.

Q. Are you telling us that Mrs. Brodzinski was not in a position to overhear what her husband told you on that subject?

Mr. Dudnik: Your Honor, there is an objection only be- [fol. 848] cause it has been asked before and he has given an opinion.

The Court: He has answered it before. He may answer it again.

A. No, I don't believe she could have.

Q. Do you know for sure, or is that just your opinion?

A. I would have to give you an opinion. I wasn't in her position to hear what the conversation was.

Mr. Leasure: That is all.

Redirect examination of Leon Plevin.

By Mr. Dudnik:

Q. Leon, why did you take a yellow page statement this time instead of a stenographic statement, tell us?

A. Well, I think, well, originally when I took, did some—you gave me some names to see, and I went out at my leisure and I took the statements.

Then, of course, there was a period when I took some stenographic statements in the case, and I think this was—well, you told me Saturday, and the only time my wife and I shop is Saturday afternoon, if I get home early enough, so I wanted to get home.

So I asked if it would be all right if I go out sometime during the weekend to see him, and Mr. Dudnik said yes. So I went out on my own time in the evening.

Q. Have you ever testified or been called to testify about any other statements that you have investigated for me? [fol. 849] A. No. This is the first time I have ever been on the witness stand.

Mr. Dudnik: That is all.

Mr. Leasure: Just a moment, Mr. Plevin.

Recross examination of Leon Plevin.

By Mr. Leasure:

Q. It is possible, is it not, to get a court reporter on Saturday afternon or Saturday evening, or at any other time if you really want one?

A. Well, you have to always say the answer to that would be yes, sure. I guess if you make enough effort to do anything you can.

Q. And you know, don't you, from your years of investigating, that it is quicker to take a stenographic statement than one of these handwritten statements, you are there a shorter time, aren't you?

A. If you are in a hurry, I would say it is all right to use a stenographic, sure. That is why I use it primarily for, is when I have to save time.

Q. In other words, if you had used a reporter to interview Mr. Brodzinski, you would have been there a shorter time than it took you by this method, is that right?

A. Yes. The answer is yes.

Q. And you would have had everything down just as it [fol. 850] was said?

A. That would be correct.

Mr. Leasure: That is all.

Further redirect examination of Leon Plevin.

By Mr. Dudnik:

Q. How long would it take you to get a court reporter on a Saturday night, do you know?

Mr. Leasure: I object to that. They are not hard to get.

The Court: Objection sustained.

Mr Dudnik: If you got a lot of money you do. Thanks, Leon.

[fol. 851] Thereupon the plaintiff, further to maintain the issues on his part to be maintained, and to rebut the testimony adduced on behalf of the defendant, called as a witness James R. Skelly, who being first duly sworn, was examined and testified as follows:

Direct examination of James R. Skelly.

By Mr. Dudnik:

Q. Mr. Skelly, will you give us your name in full, please?

A. James Richard Skelly.

Q. How old are you, Mr. Skelly?

A. 32 years old.

Q. Are you a married man?

A. No, sir, I am not.

Q. Single?

A. Yes.

Q. Where do you live?

A. I live at 2044 Cornell Road.

Q. Would you be kind enough to keep your voice up, Mr. Skelly? What is your present business or occupation?

A. I am the registrar at the Cleveland Museum of Natural History.

Q. What are the duties of a registrar at the Museum of Natural History?

[fol. 852] A. I see to the registration of the specimens and records that are kept on them, and I have charge of the inactive museum departments, scientific departments.

Q. Are you in charge of the various specimens of insects that are kept at the museum?

A. Yes, sir.

Q. And are you in charge of recording them and cataloging them, and keeping the data on them?

A. Yes, sir.

Q. What schooling did you have, Mr. Skelly?

A. I have a Bachelor of Arts degree from Western Reserve University in the field of biology.

Q. Including biology?

A. Yes.

Q. When did you graduate from Western Reserve?

A. In 1955.

Q. Have you had any other schooling after that?

A. No, I have not.

Q. In connection with your University studies, did you take up the study of entomology?

A. Yes, sir, I did.

Q. You do not consider yourself an entomologist, do you?

A. By no means.

Q. Mr. Skelly, following your graduation from the uni-

[fol. 853] versity, what did you do, sir?

A. At the time of my graduation I was employed as curator of the Cleveland Aquarium.

Q. What is a curator?

A. Sort of a glorified caretaker, I suppose. I had charge of the operation of the Cleveland Aquarium. I was not the Director, but I had the active charge.

Q. Did that include the keeping of the records of the various fish?

A. Yes.

Q. And the cataloging of them?

A. Yes, and the maintenance.

Q. How long were you the curator there?

A. For approximately two years. Until 1957, I believe. I am not sure of the dates.

Q. What did you do following that, sir?

A. I was employed as a staff biologist by the Cleveland Museum of Natural History.

Q. A staff biologist?

A. Yes, sir.

Q. And how long were you the staff biologist?

A. Until April of this year.

Q. By the way, what does the term biology embrace?

A. The life sciences, generally. Biology has—it has roots in the Greek words, bios which means life, and ology which [fol. 854] is the root that means the study of.

Q. Study of life. Does that include animal and insect life?

A. Yes, sir.

Q. What were you then did you say?

A. Staff biologist.

Q. Following that you became what?

A. I became registrar.

Q. How long have you been registrar?

A. Since April of this year.

Mr. Dudnik: Mark this.

(Plaintiff's Exhibit 20, being a box of insects, was marked for identification by the reporter.)

Q. Did you pursuant to my request and pursuant to a subpoena bring with you some specimens of aquatic bugs or insects which were under your care and jurisdiction at the museum?

A. Yes, sir.

Q. Did you at my request go down to the Columbus Road bridge and look at an area under the bridge so that I might ask you some questions for comparative purposes?

A. Yes, sir.

(Mr. Dudnik hands Plaintiff's Exhibit 26 to Judge.)

Mr. Dudnik: These are dead, your Honor.

The Court: What number is this?

Mr. Dudnik: Plaintiff's Exhibit 26.

[fol. 855] Q. I am handing you what has been marked for identification as Plaintiff's Exhibit 26, and ask you to stand up here in front of this jury, and put the exhibit in the position where they can see it and I am going to ask you some questions about them.

Mr. Leasure: Has it been established that these particular specimens have come from the area—

Mr. Dudnik: They will be. I will ask that in my next question, in my next few questions.

Q. There are nine insects there, are there not?

A. Yes, sir.

Q. Do you know what area these insects were picked up from?

A. Generally northern Ohio. Northeastern Ohio, most of them. Some of them—

Q. A little louder, please.

A. Generally northeastern Ohio. Some of them are from other areas of Ohio, but they are all from Ohio.

Q. Now, let's take the specimen on the upper left-hand corner, will you point to it?

A. This one here?

Q. Yes. What is that known as?

A. That is known as a giant water bug.

Q. Is it also known as an aquatic bug?

A. Yes, sir. It is an aquatic bug.

[fol. 856] Q. Can you tell us where that specimen was picked up?

A. In Euclid, Ohio.

Q. Euclid, Ohio?

A. Yes, sir.

Q. What is the next specimen?

A. That is also a giant water bug.

Q. Can you tell us where that was obtained?

A. I can't quite read under the name. I think it is Sandwich, Sandwich Creek, or Sandwich River.

Q. Is that in this area?

A. I believe so, yes, sir.

Q. No, sir, the big one there, number three—

A. Yes, sir.

Q. What is that?

A. That is also a giant water bug.

Q. Where was that specimen picked up?

A. In Youngstown, Ohio. Near Youngstown. I shouldn't say in Youngstown.

Q. Now, let's go to that one with the long wings—

A. Yes, sir.

Q. I am pointing to this specimen here, sir.

A. Yes.

Q. Where was that, what is that known as?

A. That is known as a Dobson fly.

Q. Where was that picked up?

[fol. 857] A. That is in Ohio. We don't know the exact locality of that, but we do know it is from Ohio.

Q. Will you give us now the locations of the three below?

A. The three below are from Euclid, Ohio, water scavenger beetles. These two are water scavenger beetles. These two are from Euclid, Ohio, and this one I can't see the locality of that. It is from the Ohio creeks, though. There is probably a little slip under there.

Q. Now, Mr. Skelly, referring to this specimen on top, did you measure it at my request?

A. Yes, sir.

Q. What is the length of that bug?

A. It is approximately two and a half inches.

Q. By the way, have you ever been a collector of these things?

A. Yes, sir. I have from time to time collected insects.

Q. Have you ever seen a water bug in the Cleveland area of that size?

A. Many times.

Q. Have you ever seen a water bug in the Cleveland area of a larger size?

A. Yes, sir, occasionally.

Q. Do you recall the area under the bridge—

A. Yes, sir.

Q. Yesterday?

[fol. 858] A. Yes, sir.

Q. Now, with relation to a similar area, similar in appearance, have you ever seen a bug of the species and size

of this large one in an area similar to the area which you saw yesterday under the bridge?

Mr. Leasure: I object.

A. Yes, sir, I have.

Mr. Dudnik: Just a moment.
Mr. Leasure: I object.
The Court: What is the objection?
Mr. Leasure: Two-fold, your Honor. First he says similar to that. That could cover a pretty wide area. It is indefinite at best. And, secondly, whether he ever saw, going into possible—
Mr. Dudnik: Not possible. He knows whether he saw it or not.
The Court: He may answer.
Mr. Dudnik: Read the question, and then answer it.

(Last question read by the reporter.)

A. Species I couldn't refer to. But I certainly have seen giant water bugs in areas similar to that.
Q. I am talking about water bugs. You have seen them there?
A. Yes, sir.
Q. Have you seen them—bearing in mind, I am talking [fol. 859] now with reference to a similar area. Have you seen them in the water?
A. Yes, sir.

Mr. Leasure: Objection. May I have an objection continuing to this entire line?
The Court: Yes. He may answer.
Mr. Leasure: Also on the grounds of relevancy.

Q. Have you seen them on the ground around the water?
A. Yes, sir, I have.
Q. These folks can't hear you.
A. Yes, sir, I have.
Q. Now, then, have you ever seen them crawl?
A. Yes, sir, I have.
Q. Can you tell us whether they crawl fast or slow?

Mr. Leasure: I object, your Honor.

A. I would think—

The Court: The objection will be sustained.

Q. You have seen them crawl?

A. Yes, sir.

Q. And have you seen them crawl many times or few times?

Mr. Leasure: Objection.

The Court: Objection sustained.

[fol. 860] (Thereupon counsel and the Court conferred at the bench outside the hearing of the jury.)

Mr. Dudnik: Now, what is the question?

(Last question was read by the reporter.)

Q. Just answer whether you saw them crawl many times or a few times?

Mr. Leasure: I think there was an objection.

The Court: That was the whole line of questioning that you objected to.

Mr. Leasure: And I object specifically to this question.

The Court: Have you seen them crawl many times or a few times?

Mr. Leasure: Objection.

The Court: He may answer.

A. A few times.

Mr. Hadden: What was the answer?

Mr. Dudnik: A few times.

A. That is not with reference to the number of insects which I have seen crawling, but the number of times I have seen them crawling.

Q. I am talking about water bugs.

A. Yes, sir.

[fol. 861] Q. Have you seen them crawl many times or a few times?

A. I have seen water bugs crawl a few times.

Mr. Dudnik: Now, my next question I know will be objected to, your Honor. May I ask it for the record?

The Court: You may.

Q. Have you an opinion based on the times that you have seen these water bugs crawl as to how long it would take a water bug to crawl up a man's leg from the heel to four inches above the knee, but you answer that yes or no, and don't give your opinion. Have you such an opinion?

Mr. Leasure: I think I will object right here, your Honor, because the man has not been qualified as an expert in the field; whether he has an opinion or not doesn't make any difference.

The Court: Objection will be sustained.

Q. Do you know whether or not the water bugs, the type of water bugs which you just showed us, bite man or not?

Mr. Leasure: Objection.
The Court: Sustained.
Mr. Dudnik: If he knows.

Q. Have you ever been bitten by a water bug?

Mr. Leasure: I object.

A. Yes, sir.

[fol. 862] The Court: He may answer.

A. Yes, sir, I have.
Q. You may resume the stand.

(Witness resumes witness stand.)

Mr. Dudnik: No more questions.
Mr. Hadden: Are you going to offer that?
Mr. Dudnik: I am not going to offer that, no.

Cross examination of James R. Skelly.

By Mr. Hadden:

Q. Mr. Skelly, in answer to Mr. Dudnik's questions—withdraw the question.
What did Mr. Dudnik ask you to do when he first got in touch with you about this matter?

A. He asked me if I knew of any insect over an inch and a half or two inches long which are capable of biting man that occur in this area.

Q. And your collection of insects which you brought with you is in response to that request?

A. Yes, sir. He asked me then to bring them down with me to his office.

Q. He asked you whether or not any of these insects which you were aware was capable of biting a man, is that right?

[fol. 863] A. Yes, sir.

Q. Tell me a little bit about your training, Mr. Skelly, in entomology, what does it consist of?

A. I had a course, one course in entomology at Western Reserve University.

Q. How long ago was that?

A. Well, 1954.

Q. How long a course was it?

A. Well, one semester course, a three-hour course.

Q. An elementary course?

A. Yes, sir. Introductory I would say, not an elementary course, but an introductory course.

Q. Introductory course, this was the first course you ever had to the subject matter, is that so?

A. Yes.

Q. Then you very properly say you cannot describe yourself as an expert in this field?

A. I would not by any means call myself an expert in the field of entomology.

Q. In answer to Mr. Dudnik's question you said you had seen giant water bugs in areas similar to the one which he asked you to visit, sir, do you recall that answer?

A. Yes, sir.

Q. Did you see any down there at the time you visited?

A. No, sir, I did not.

[fol. 864] Q. Did you look for any?

A. I believe it; is too early now. I just went to look at the area mainly.

Q. Can you describe an area which you have seen that looks like the one under the bridge?

A. The opening of Euclid Creek into the lake, about three hundred yards back from the shore of the lake.

Q. That is fresh running water?

A. Well, it is water, and it is running, but I wouldn't exactly describe it as fresh.

Q. It is running water?

A. Yes.

Q. What do you know about the habits of the giant water bugs, sir?

A. I know that they are found in fresh water, practically. They are generally distributed throughout the world. Beyond that I don't know.

Q. What does the word aquatic bug mean?

A. Aquatic bug means that it lives in the water; the same as a duck is an aquatic bird.

Q. What does the giant water bug feed on?

A. The giant water bug feeds on other insect and plant and animal material. Mainly animal material, small fish, crayfish, and things like that.

Q. Things that it finds in the water?

[fol. 867] A. Generally, yes, as far as I know. I couldn't testify as to the dietary habits of the bug.

Q. Are they the sort of insect, sir, that habitually preys or attacks human beings?

A. Only when they are improperly handled. At the time I was bitten was when I improperly handled one. It started to run up my arm and I grabbed it and he bit me.

Mr. Hadden: That is all.

Mr. Dudnik: Thank you. Your Honor, may I show these to the jury once more?

Mr. Hadden: Your Honor, there is an objection in that the only bug that has been testified to by this gentleman is the giant water bug. And this is full of specimens that have in no way been connected with this case.

Mr. Dudnik: I just want to show them, let them see this. They have seen it before. I just want to show it once more.

The Court: Are you introducing it in evidence?

Mr. Dudnik: It has been introduced—I am not offering it. I am sending it back to the curator of the museum.

They have seen it before, and I want them to see it once more.

Thank you, Mr. Skelly.

[fol. 866] Thereupon, JAMES J. GALLICK, plaintiff herein, further to maintain the issues on his part to be maintained, and to rebut the testimony adduced on behalf of the defendant, offered himself as a witness in his own behalf, and being previously sworn, was examined and testified as follows:

Direct examination of James J. Gallick.

By Mr. Dudnik:

Q. Jim, I have to ask you a couple of questions. Jim, do you know Benedict Brodzinski?

A. Brodzinski, yes.

Q. Jim, I want you to tell the judge and the jury whether you ever talked to Ben Brodzinski, or Benedict Brodzinski, about the way you had your accident?

A. I did not.

Q. You did not?

A. I did not.

Q. Did you ever tell him you were bitten by a bug?

Mr. Leasure: I think I will object to this, your Honor. He answered he didn't have any such conversation. Anything else is repetitious.

Q. Do you know Mr. Giese, the yardmaster?

[fol. 867] A. I do.

Q. Did you ever talk to Mr. Giese about your accident?

A. I did not.

Q. Did you ever tell him anything about it?

A. No.

Q. Did you ever wear shorts?

A. Never.

Q. Did you ever work outside in your yard in shorts?

A. No.

Q. Have you ever seen Brodzinski of Giese since you

didn't return to work, in other words, did they ever see you at the hospital or at home?

A. No.

Mr. Dudnik: That is all.

Mr. Leasure: No questions.

The Court: Ladies and gentlemen of the jury, we will recess for the luncheon period now, once more with the admonition that you do not talk about this case to anyone, not even amongst yourselves, and you will return at 1:30.

(Thereupon an adjournment was taken to 1:30 p.m., June 22, 1959, at which time the following proceedings were had:)

[fol. 868] Monday afternoon session, 1:30 p.m.,
June 22, 1959

Surrebuttal

Thereupon the defendant, further to maintain the issues on its part to be maintained, and to rebut the testimony adduced on behalf of the plaintiff on rebuttal, called as a witness Gladys Brodzinski, who, having been first duly sworn, was examined and testified as follows:

Direct examination of Gladys Brodzinski.

By Mr. Leasure:

Q. Will you give us your full name, please?

A. Gladys Brodzinski.

Q. Will you speak up? I can't hear you.

A. Gladys Brodzinski.

Q. Are you the wife of Mr. Brodzinski who has testified in this case?

A. I am.

Q. Where do you live, Mrs. Brodzinski?

A. 2498 West 8th Street.

Q. How long have you and Mr. Brodzinski been married?

A. 23 years.

Q. Calling your attention to an occasion a week ago last

Saturday, did a Mr. Plevin from Mr. Dudnik's office come [fol. 869] to your home?

A. Yes, he did.

Q. Were you present there when he arrived?

A. Yes, I was.

Q. Were you present there during all the time that he was there?

A. Yes, I was.

Q. Were you present when he and your husband had a conversation about the case of Mr. Gallick?

A. Yes.

Q. Will you tell us where you were or how close you were to the conversation between Mr. Plevin and your husband that was taking place?

A. Oh, about 10 feet.

Q. About 10 feet?

A. Yes.

Q. Can you tell us, Mrs. Brodzinski, whether you overheard all of the conversation that took place between those two men?

A. Yes, I did.

Q. Did there come a place in their conversation when your husband told Mr. Plevin about a conversation your husband had had with Mr. Gallick?

A. Yes.

Q. Will you tell us in your own words what it was that [fol. 870] you overheard your husband tell Mr. Plevin on that subject?

A. He said that Mr. Gallick told him that the day before he had been either bitten by a bug or a piece of steel sliver. It was in his leg, of course.

Q. Was that the extent of it on that subject then?

A. Then my husband told, he even picked up his pant leg and showed it to my husband and my husband said it looked pretty bad, and told him to either go to a druggist or a doctor, or make out a 790.

Q. Is that what you overheard your husband telling Mr. Plevin?

A. Yes, I did.

Q. And upon your husband saying what you have described did Mr. Plevin say anything?

A. Mr. Plevin repeated the same thing as my husband said and proceeded to write it down.

Q. Will you tell us in your own words the substance of what Mr. Plevin said when your husband told him what you have just related?

A. Mr. Plevin just wrote it down. He didn't make any comment on it. He says "Do you know if Jim ever made out the 790?" And he said he didn't think he did.

Q. Perhaps I didn't understand you. Let me get it clarified. Did you say when your husband told Mr. Plevin that, that Mr. Plevin repeated it?

[fol. 871] A. Yes, he did, he repeated it and wrote it down.

Q. Will you tell us just what it was that Mr. Plevin said?

A. He said it was a bug bite or a piece of steel sliver.

Q. That is Mr. Plevin said that?

A. Yes.

Q. Now, have you ever testified in court before?

A. No.

Q. Try not to be nervous, if that is possible. If you know, did I talk to your husband Saturday and ask that you come down here today?

A. Not that I know of. I think he—somebody told me, he told me I was supposed to be down but I don't know who told him.

Q. All right. So your husband asked you to come down here today?

A. Yes.

Q. But you don't know who asked your husband to ask you?

A. No.

Mr. Leasure: That is all. You may cross-examine.

Cross examination of Gladys Brodzinski.

By Mr. Dudnik:

Q. Mrs. Brodzinski, don't be nervous. I have only a couple of questions to ask you, and I will ask them real [fol. 872] easy. Okay?

Did you talk to Mr. Glenn since Saturday or last Friday?

A. I talked to him today.

Q. And you went over your testimony, didn't you?

A. Well, they asked me and I told them just what I told here in Court.

Q. Now, Mrs. Brodzinski, were you in the same room with your husband and Mr. Plevin at all times?

A. I wasn't in the same room. But it is an archway and therefore I heard everything.

Q. You could hear without any trouble?

A. Yes.

Q. Could you see without any trouble?

A. Yes.

Q. Were you in a position then where you could not only hear Mr. Plevin and your husband, but also see Mr. Plevin and your husband?

A. Yes.

Q. Then I presume you heard everything that your husband said?

A. Yes.

Q. And everything that Mr. Plevin said?

A. Yes.

Q. Was there anything that your husband said to Mr. Plevin with regard to changing any of the statement?

[fol. 873] A. Well, my husband started reading the statement. Well, that's when they went into the dining room to get a better light, and started reading the statement and glanced over a part of it, then all of a sudden he saw a mistake there.

Q. I am going to stop you—I will let you finish it—but at this point could you see them both, too?

A. Yes.

Q. And you could hear them both?

A. Yes.

Q. Now, you said all of a sudden he saw a mistake?

A. Yes.

Q. Now what happened then?

A. Then he told Mr. Plevin to change that part. The first part he just glanced over it and he told him to change that part. Then he sat down and read the rest of the testimony, or the statement, whatever you call it.

Q. He did tell him that he wanted something changed?

A. Yes.

Q. How many times did he tell him that?

A. Oh, about three times altogether, I think.

Q. And you heard him say, "This is wrong, I want it changed"?

A. Yes.

Q. And you saw Mr. Plevin make the change?

A. Yes.

Q. Then you saw your husband sign it?

[fol. 874] A. Yes.

Q. Then you heard him say that in another place?

A. Yes.

Q. And the change was made?

A. Yes.

Q. And your husband signed it?

A. Yes.

Q. Then you heard him say in another place, three altogether if that is your recollection?

A. Yes.

Q. Now, do you remember what those three changes were that your husband wanted to make?

A. I remember two perfectly well.

Q. Allright.

A. One was when Jim picked up his pant leg, the statement that Mr. Plevin wrote down was that it was bleeding, and my husband made him change it to there was blood around it.

Another one was that there were rats in the swamp, and my husband said there weren't any.

Q. I am giving you the statement, this is the one your husband signed; look it over for a minute and take your time.

A. Well, here Mr. Plevin omitted the steel sliver.

Q. I know, that is what your husband said, too. But take a look and see where it says about bleeding. When you get [fol. 875] to that part will you let me know, Mrs. Brodzinski?

A. Well, I heard that and I made my husband—my husband told him to change that. But it doesn't say so in here.

Q. Read the part that you said before was regarding blood where your husband told him to change it and he said the change.

A. Oh, you mean—

Q. This part. We will get to the next one. Read the part out loud about the blood.

A. (Reading) Pulled up his pants leg and showed me his leg. It was itching him, and when I looked at it it looked like a mosquito bite, only that the top of the skin was broken from scratching, and open with some blood about it. You could see it was flesh. He told me about it because it was bothering him. I told him to go see a doctor or go to the drug store.

Q. Up to there, on that page that is where you said that your husband told him to change the word from blood to bleeding, is that it?

A. No. From bleeding to blood.

Q. From bleeding to blood. And do you see any changes there, anything crossed out?

A. No, I don't, but I remember that.

Q. Did you say before or am I mistaken that your husband made him change that and signed the change, were [fol. 876] you mistaken or was I mistaken?

A. No, I am right, I am sure of that.

Q. You are sure that there was something there about blood?

A. Yes.

Q. And your husband signed it?

A. Yes.

Q. Now, will you look through there and see if there is anything in that statement about blood where your husband changed or signed the change, and take your time because I want you to be right, Mrs. Brodzinski. When you have finished looking it over, you tell me and then I have a question to ask you. But take all the time you need, Mrs. Brodzinski.

Have you finished it?

A. Yes, sir.

Q. Now, Mrs. Brodzinski, in this statement which you just looked at, there are three corrections as they appear in this statement which your husband asked to be made and apparently signed right next to the corrections, isn't that right?

A. (Witness nods.)

Q. One was changed from the sentence, "It was still there although it hadn't rained for" and the word "over" was stricken out and "about" a week was put in, isn't that right, and your husband signed it?

[fol. 877] A. Yes.

Q. Did you hear him talk about that?

A. Yes.

Q. And that was changed, wasn't it?

A. Yes.

Q. Then there was a word, "I never noticed the railroad to my knowledge make any attempt to get rid of these dead rats and pigeons about area or underneath the bridge;" then there is something crossed out, a word apparently crossed out in that sentence, isn't there?

A. Yes.

Q. And that is signed by your husband where the crossout was made, isn't it?

A. Yes.

Q. That is the second one. Now, the third one is a sentence, two sentences, but in between is written, in between the two sentences, "It was seasonal," do you see that?

A. Yes, yes.

Q. And apparently your husband said, he told him to put it it was seasonal?

A. Yes, that was on account of the bugs being around.

Q. That's right, we will read it then, "There will always be a lot of bugs or insects there at that muddy stagnant pool, but it would get worse at times depending on the time of the year," and then in between it says, "It was seasonal"?

[fol. 878] A. Yes.

Q. And he signed that?

A. Yes.

Q. Now, you have looked it over, you don't see any other corrections that were signed by your husband?

A. No.

Q. Now, you have looked over the part about the blood; did you see anything crossed out or changed on it about blood?

A. No, but I remember that.

Q. But there is nothing in here?

A. No.

Q. And you remember your husband telling Mr. Plevin to take it out or change it from blood to bleeding?

A. Yes—no, from bleeding to blood.

Q. And you say Mr. Plevin didn't do that?

A. Apparently he didn't.

Q. And your husband still signed the statement?

A. Yes.

Q. Did you watch your husband read this?

A. Well, when he first took it he just sort of glanced at it. And then when he saw that first mistake, then he started reading it.

Q. He didn't see the first mistake until the third page, there were no mistakes on the first two pages.

[fol. 879] Mr. Leasure: I object to that last question, your Honor. It has already been testified to here that there was a very grievous omission on the first page.

Mr. Dudnik: That is what we are getting to talk about, Mr. Leasure, if you will give me an opportunity.

Mr. Leasure: I think the question is assuming something that the evidence is contrary to.

The Court: Read the question.

(Last question was read by the reporter.)

Mr. Dudnik: The witness said that after he noticed the mistake he began to read it carefully, and I am just developing that.

The Court: Now this question says he didn't see any mistakes until the third page, is that what the question is?

Mr. Dudnik: Yes.

Mr. Leasure: It is a double-barreled question, your Honor. The first part of it is that, and then the second barrel of the question is there were no mistakes—

Mr. Dudnik: I will take the barrels out of it, your Honor, [fol. 880] and put my question without barrels.

Q. Do you see any corrections that your husband made on the first page?

A. No, I don't.

Q. Do you see any corrections that your husband made on the second page?

A. No.

Q. I take it the first correction your husband made was about a fourth down of the third page, is that right?

A. Well, that's what I mean, like sometimes somebody gives you a paper, you scan the first part and omit sometimes the very important thing in there, and then you happen to see something and really read it then.

Q. That is what you think your husband did?

A. Yes.

Q. I am going to ask you one more question, the same question Mr. Leasure asked Mr. Plevin. Do you and your husband depend upon the B & O Railroad for a living?

A. My husband works there, yes.

Mr. Dudnik: Thanks very much.

Redirect examination of Gladys Brodzinski:

By Mr. Leasure:

Q. A couple more questions, Mrs. Brodzinski. Does your husband have seniority on the railroad?

[fol. 881] A. Yes, he has.

Q. How much?

A. 17 years.

Q. Thank you. Secondly, did your husband tell Mr. Plevin about the steel splinter?

Mr. Dudnik: Objection. This is redirect. It has been asked twice.

The Court: Objection sustained.

Q. And did Mr. Plevin respond by mentioning the steel splinter himself?

Mr. Dudnik: Objection.

A. Yes.

The Court: Objection sustained.

Mr. Leasure: That is all.

OFFER IN EVIDENCE

Mr. Dudnik: I offer this statement in evidence now at this time, your Honor.

Mr. Leasure: I object.

The Court: Has it been referred to as an exhibit?

Mr. Dudnik: Yes, Plaintiff's Exhibit 25-A, 25-B, 25-C, and 25-D. It has been testified to by Mr. and Mrs. Brodzinski, they looked it over.

Mr. Leasure: Only certain parts.

Mr. Dudnik: I think it is proper to offer it in evidence.

[fol. 882] The Court: The objection will be sustained.

Mr. Dudnik: Thank you, thank you, Mrs. Brodzinski.

Mr. Leasure: Thank you very much, Mrs. Brodzinski. That is all we have, your Honor. We rest again.

Thereupon the defendant rested.

Thereupon the plaintiff rested.

Testimony closed.

* * * * * * *

[fol. 883] DEFENDANT RENEWS ITS MOTION FOR A DIRECTED VERDICT AND OVERRULING THEREOF

Mr. Leasure: At the conclusion of all the evidence the defendant renews its motion for a directed verdict in its favor, on the same ground and for the same reasons as stated on the motion made at the end of the plaintiff's case, being substantially failure of proof of a prima facie case by the plaintiff.

* * * * * * *

[fol. 886] The Court: At this time the Court will overrule the motion for a directed verdict by counsel for the defendant.

Mr. Leasure: Then I would like to take this up, your Honor, as I understand it there are two specifications of negligence remaining in the amended petition, I think numbers 4 and 6.

I would like at this time—I will do this severally—I would like to move to strike specification number 4 as not being supported by the proof at this stage of the proceedings, and also separately a motion to strike specification

number 6 for the same reasons, and further, in case the motion to strike number 6 is overruled, then alternatively we ask the Court to strike out from specification number 6 the words lice and vermin.

I haven't heard any testimony here about lice or vermin, [fol. 887] whatever that word may mean.

Mr. Dudnik: Vermin was used all over the place.

Mr. Hadden: What are they?

Mr. Nürenberg: Actually, vermin I think would include by definition dead pigeons, rats.

Mr. Leasure: I haven't heard of any vermin, I don't know whether rats and pigeons are vermin or not. But if they are then that is the only kind of vermin I have heard anything about.

Mr. Dudnik: Isn't that enough?

Mr. Leasure: I don't think so under the evidence.

The Court: Are you through?

Mr. Leasure: I am through with the motion.

COURT'S RULING ON MOTION TO STRIKE SPECIFICATIONS OF NEGLIGENCE

The Court: The Court will overrule your motion to strike specification number 4. The Court will grant your motion as to number 6, the second part of your motion dealing with the word "lice." The word "lice" will go out of the allegation of specification of negligence, in specification number 6.

Mr. Leasure: In other words, do I understand you are overruling my motion to strike number 6?

[fol. 888] The Court: And granting your motion in the alternative to strike the word "lice" from the specification.

* * * * * * *

[fol. 913] Tuesday morning session, 9:15 a.m.,
June 23, 1959

COLLOQUY

(Thereupon proceedings were resumed in the presence of the jury, as follows:)

The Court: Ladies and gentlemen of the jury, as you know, when I sent you back to the jury room yesterday,

and I told you that there were serious questions of law that have arisen in this case, and has required the attention of counsel on both sides of the table and the Court, we have been at this thing all afternoon yesterday and all morning this morning.

We have concluded with all the evidence in the case. I told you that when you went upstairs yesterday, I feel now that we are progressing to a point where we are going to get down to the final business in this case this afternoon.

I am asking you to take an early lunch so that we can get started early this afternoon. I wonder could you all be back here by 12:30?

Mr. Dudnik: I suggest, your Honor, there are some things that have to be typed up by the court—

The Court: We will take care of it. You get back by 12:30 if you can, and we will try to start as soon after 12:30 as is possible; once more with the admonition that [fol. 914] you do not talk about this case with anyone, not even amongst yourselves.

(Thereupon an adjournment was taken to 12:30 p.m., June 23, 1959, at which time the following proceedings were had:)

. . . . . .

[fol. 927] STATEMENT BY COURT RE: INSTRUCTIONS

The Court: Defendant's objection to plaintiff's instruction which reads as follows is sustained:

"You are instructed as a matter of law that certain witnesses have been permitted to give their opinion in answer to a question based upon facts which the witness was asked to assume. Such questions are known in law as hypothetical questions and the facts which the law permits to be assumed by the witness are such facts as the evidence tends to prove."

Plaintiff's objection to Defendant's instruction which reads as follows is sustained:

"I charge you that a wild animal is an animal which by custom is not devoted to the service of mankind at the time and in the place in which it exists.

fol.929 "The word 'animal' as used here includes not only animals strictly so called, but also birds and insects.

"I further charge you that where wild animals (including birds and insects native to the region) exist in their natural state, the one owning or maintaining the property upon which they exist is not required to do anything to either remove them or to reduce them in numbers. This rule applies in this case."

Plaintiff's objection to Defendant's instruction which reads as follows is sustained:

"I charge you that the Plaintiff must prove each and every essential claim in his petition by the greater weight of the evidence.

"Plaintiff claims that his employer failed to furnish him with a reasonably safe place to work. All that is required of the employer is to furnish a place of work that is reasonably safe for persons in normal health, and persons without abnormal bodily conditions, unless the employer is shown to know or to have reason to know beforehand that the employee is not in normal health or suffers from some abnormal bodily condition. This rule applies in this case."

Plaintiff's objection to Defendant's instruction which reads as follows is sustained:

fol.929 "I charge you that an employer is not required to keep his premises free of insects, birds, and animals existing in a state of nature."

. . . . . .

fol.934 The Court: Members of the jury, before the arguments of counsel the Court gives to you certain propositions of law which are submitted in writing and which will be with you in the jury room.

These propositions of law are the law of the case, and you will consider them, together with the law I will give you in the charge at the close of arguments of counsel, as constituting the entire law of the case to be used by you

in reaching your conclusion, and to control you in your deliberations.

You are instructed as a matter of law that if you find from the evidence that underneath the Columbus Road bridge there existed a pool of stagnant water which contained dead pigeons, dead rats, and various kinds of [fol. 935] insects, and said condition existed for a sufficient period of time to be discovered and eliminated by defendant in the exercise of reasonable care, then under such circumstances the railroad is charged with notice or knowledge of such condition whether or not there was actual notice or actual knowledge to a responsible official, agent, or employee of the railroad.

You are instructed as a matter of law that the defendant owed plantiff the duty of exercising reasonable care to furnish him a safe place in which to work, and this duty was a continuing, non-delegable duty; and the defendant was not relieved from this duty even if you find from the evidence that plaintiff's work at the place in question was fleeting or infrequent.

If you find from the evidence that defendant did not discharge this duty to plaintiff, then you must find the defendant was negligent.

The B & O in this case was not required to guard against that which a reasonably prudent person, under the circumstances, would not anticipate as likely to happen. If a person has no reasonable ground to anticipate that a particular condition, no matter what it may be, would or might [fol. 936] result in a mishap and injury, then the party is not required to do anything to correct such a condition. You must apply this rule to this case.

In measuring the B & O's duty to anticipate—that is, in considering how much and how far the defendant ought to have gone in foreseeing and guarding against possible mishaps and dangers—the past experience respecting the location and conditions in question may properly be drawn upon. It is entirely proper in this case to take into account the fact, if you find it to be a fact, that no occurrence of the kind here alleged either occurred, or was known by defendant to have occurred, at or near this place before

August of 1954, as bearing upon and indicating what the defendant here should reasonably have foreseen for the future.

If you find from the evidence that defendant is negligent and such negligence was an approximate cause of damage to the plaintiff, then defendant is liable for all consequences proximately resulting from such negligence, even if you find from the evidence that defendant neither foresaw nor should have foreseen the extent or nature of such damage.

I charge you that the B & O is not an insurer against all mishaps to plaintiff which might occur on its [fol. 937] premises; nor was the B & O required to maintain its property in a perfectly clean or sanitary condition; nor was it required to keep its premises free of all water, pigeons, rats or insects. Defendant's duties are measured by what is reasonably foreseeable under like circumstances.

I charge you that the taking of special precautions against a danger or risk of injury that is only remotely possible is not required of an employer. Likewise, the B & O is not to be held here to an unreasonable degree of care, nor to the performance of practical impossibilities.

You are instructed as a matter of law that the term "injury" as used in the Federal Employers Liability Act under which this action has been brought and is governed, includes any illness, disease, or condition of ill-being of the plaintiff which you find from the evidence the negligence if any of defendant even in the slightest degree was a proximate cause.

I charge you that the facts standing alone that Mr. Gallick was bitten or stung by an insect on B & O premises, and that he was injured or infected thereby, even if proven, do not mean necessarily that plaintiff's place of work was [fol. 938] not reasonably safe. The mere happening of a bite or sting on B & O premises, and injury or infection therefrom, even if proved, do not establish that the place of work was unsafe.

The burden is upon plaintiff to prove all essential elements of fact to a probability, and by the greater weight of the evidence. And the cause of injury and damage must be proved to a probability, and not by guess or conjecture.

I charge you that in measuring what the B & O should have done, or should not have done in this case, it is not fair or proper to take a point of view after the occurrence or to consider the railroad's conduct in the light of after events. In measuring the B & O's conduct here, the point of view to be taken should be the view before the mishap occurred, to see what, in the light of the facts then known, should or could reasonably have been anticipated. And you must follow this rule in this case.

You are instructed as a matter of law that in determining whether the damage, if any, suffered by the plaintiff was proximately caused by the negligence, if any, of the defendant, the law requires only that you find from the evidence a reasonable probability that plaintiff sustained such damage, if any, by reason of the negligence, if any, [fol. 939] of the defendant.

In determining what amount of money will fully, fairly and adequately compensate plaintiff you should consider such of the following elements of damage as you may find from the evidence:

The pain and suffering of body and mind, if any, which plaintiff has endured to the present, and such pain and suffering of body and mind, if any, as you find with reasonable medical certainty that plaintiff will endure in the future;

The loss by plaintiff of the use, function and enjoyment of his legs up to the present, and such future loss of use, function and enjoyment of his legs and ability to get about, if any, as you find with reasonable medical certainty plaintiff will sustain in the future;

Such pain, suffering, inconvenience and disability, if any, that plaintiff has endured by reason of surgical procedures performed upon his person, and such pain, suffering, inconvenience, and disability if any as you find with reasonable medical certainty that plaintiff will endure in the future;

The medical care, attention, therapy and treatment, if any, which plaintiff has undergone to the present, and [fol. 940] such future medical care, attention, therapy and treatment, if any, which you find with reasonable medical certainty plaintiff will undergo in the future;

Such humiliation, cosmetic disfigurement, mental anguish and nervous shock, if any, which plaintiff has endured to the present, and such mental anguish, humiliation, cosmetic disfigurement, and nervous shock, if any, which you find with reasonable medical certainty plaintiff will endure in the future;

Such pain, suffering, and disability if any which plaintiff has sustained by reason of various narcotics, administered orally or by injection to his person, and such pain, suffering, and disability if any as you may find with reasonable medical certainty he will suffer in the future by reason of narcotics administered orally or by injection;

The impairment, pain, suffering, and disability, if any, which he has sustained in the use, function and enjoyment of his right arm to the present, and such pain, suffering, and disability if any as you may find with reasonable medical certainty he will incur in the future in the use, function, and enjoyment of his right arm;

The reasonable cost of any necessary hospital confinement [fol. 941] and medical or surgical treatment, therapy, care and attention incurred to the present time, and the reasonable cost of any necessary hospital confinement if any which you may find with reasonable medical certainty will be incurred in the future;

The reasonable value of any loss of wages which plaintiff may have sustained to the present, if any, and such future loss of wages, if any, as you find with reasonable certainty plaintiff will sustain in the future, which sum, however, shall be reduced by you to its present value;

And such permanent disability, if any, with which you find plaintiff has been afflicted to the present, and such permanent disability, if any, that you find with reasonable medical certainty plaintiff will be afflicted in the future.

In any event, however, such sum of money cannot be in excess of the sum prayed for by plaintiff in his amended petition, which in this case is the sum of $750,000.

Mr. Dudnik?

(Thereupon counsel for plaintiff made his opening argument to the jury, as follows:)

. . . . . .

[fol. 988] Wednesday morning session, 10:15 a.m.,
June 24, 1959

(Thereupon proceedings were resumed in the absence of the jury, as follows:)

DEFENDANT'S REQUESTS FOR SUBMISSION OF SPECIAL INTERROGATORIES TO JURY

Mr. Leasure: At this time let the record show that the defendant is filing and offering to the Court requests for submission of special interrogatories to the jury.

Those interrogatories are offered separately and severally, as to the interrogatory appearing on each page.

They are numbered 1 through 15. However, there appears under the heading number 2 numerous interrogatories numbered 2-A through 2-U, and each of those is offered separately and individually, as well as the remaining interrogatories.

I want to also add to the record that a copy of these interrogatories has been in the hands of the Court since two days ago, Monday afternoon, which would be June 22nd, this being June 24th.

Mr. Dudnik: Let the record show, I am entering an objection to the offering of the interrogatories, as well as the submission of them.

Mr. Leasure: Judge, I think I should state that I read [fol. 989] into the record the offer of the special interrogatories.

The Court: Yes, the court reporter has told me that, and that is what I want to consider.

Number one, I want you to understand, I want counsel on both sides to understand that at the closing of arguments yesterday Mr. Leasure repronounced the general objection to plaintiff's counsel's argument to the jury, and the Court withheld the ruling on that objection until this morning and the Court is now overruling that objection.

Now, as I understand it, Mr. Leasure has dictated to the reporter the interrogatories that he has submitted to the Court this past couple of days ago—was it Monday?

Mr. Leasure: It was two days ago, your Honor. I didn't read them into the record.

The Court: You referred to them.

Mr. Leasure: I referred to them and offered them, presented them in effect to the Court and described the number of them and explained that I was offering each one separately and individually.

By each one I mean the one appearing on each page. So that even though several are numbered 2, namely, 2-A, [fol. 990] 2-B, 2-C, and so forth, each of those are offered individually as well as severally.

The Court: To that I understand counsel for plaintiff has objected. The Court will sustain the plaintiff's objection, excepting as to the following interrogatories.

Mr. Nurenberg: May we have just a moment, your Honor?

The Court: Yes. Ready?

Mr. Dudnik: Yes, your Honor.

The Court: 2-F. 2-G.

Mr. Nurenberg: These are the ones being given?

The Court: That's right. 2-F. 2-G-1, and 2-G-4. 2-I-1. 2-J-1. 2-K-1. 2-P. 2-Q. 2-T. 3-A. 5-A and 5-B. 6-A and 6-B. 7-A. And 15.

Mr. Nurenberg: May we be heard on any of these, your Honor?

The Court: Yes, you may be heard.

Mr. Dudnik: May we read them first?

The Court: What is that?

Mr. Dudnik: May we read them now?

The Court: Yes.

I wonder if we may do this to save time. I am going to have these typed up, and I would like to call the jury down [fol. 991] and let them go to lunch, so that we can start at an early hour as quickly as possibly.

Mr. Leasure: Your Honor, I want to make sure I understand. I don't know exactly mechanically how these submitted interrogatories are handled, whether they are

marked, filed and put in with the original papers in the case or what.

I just want to make sure I do whatever is necessary for that. All of the interrogatories that I have submitted do become part of the original papers in the case. So that then by reference thereto it will show what interrogatories have been rejected by the Court.

The Court: They will be filed and made a part of the record in the case. However, only those that the Court is now referring to will go to the jury.

Mr. Leasure: Yes, I understand that.

Mr. Nurenberg: May I ask this, your Honor, before voicing our objection, whether these interrogatories are being submitted as interrogatories under the interrogatory statute, or are they being submitted as a special verdict?

The Court: They are being submitted as interrogatories.

Mr. Nurenberg: Under 2315.16?

[fol. 992] The Court: Yes.

Request for Special Interrogatories

(Thereupon counsel for defendant submitted to the Court the following Request for Special Interrogatories:)

"Now comes the defendant and requests that the Court submit to the jury the attached interrogatories to be answered by the jury in conformity with the statute. These are submitted severally."

Interrogatory No. 1

Has it been proved by a preponderance of the evidence that Mr. Gallick was bitten or stung by an insect at the Columbus Road bridge of defendant in August, 1954?

Answer: .....

Interrogatory No. 2

If your answer to No. 1 is "Yes," answer the questions that follow. If the answer is "No," do *not* answer the following questions. If you answer the following, and find that there are some questions that you cannot answer, please so state:

2(a) What kind of insect was it?
Answer: .....

[fol. 993] Interrogatory No. 2 (b)

What were the insect's feeding and living habits?
Answer: .....

Interrogatory No. 2 (c)

What was the insect's size, shape and construction?
Answer: .....

Interrogatory No. 2 (d)

Was the insect winged or crawling?
Answer: .....

Interrogatory No. 2 (e)

Where had the insect originated?
Answer: .....

Interrogatory No. 2 (f)

Was the insect the same kind as lived generally in this area, both on and off B & O property?
Answer: .....

Interrogatory No. 2 (g) (1)

Was it inside of his trouser leg at the time of the bite or sting?
Answer: .....

[fol. 994] Interrogatory No. 2 (g) (2)

If so, how did it get there?
Answer: .....

Interrogatory No. 2 (g) (3)

Where was it just prior to setting on Mr. Gallick?
Answer: .....

Interrogatory No. 2 (g) (4)

How long did it take it to go from the place it first got on Mr. Gallick to the point where it bit or stung him?

Answer: .....

Interrogatory No. 2 (h) (1)

Can you say for how long the insect had been on B & O property, if at all, prior to getting on Mr. Gallick?

Answer: .....

Interrogatory No. 2 (h) (2)

If so, for how long?

Answer: .....

Interrogatory No. 2 (h) (3)

If so, where on B & O property had it been for that length of time?

[fol 995] Answer: .....

Interrogatory No. 2 (i) (1)

Has it been proved that the B & O did something that caused this particular insect to be on Mr. Gallick at the time and place in question?

Answer: .....

Interrogatory No. 2 (i) (2)

If so, what?

Answer: .....

Interrogatory No. 2 (j) (1)

Has it been proved that the B & O failed to do something that caused this particular insect to be on Mr. Gallick at the time and place in question?

Answer: .....

Interrogatory No. 2 (j) (2)

If so, what?

Answer: .....

Interrogatory No. 2 (k) (1)

Has it been proved by a preponderance of the evidence that it was the kind of a bug or insect that would be expected to attack man?

Answer: .....

[fol. 996] Interrogatory No. 2 (k) (2)

If so, what are its habits in that regard?

Answer: .....

Interrogatory No. 2 (l) (1)

Has it been proved that any result other than possibly minor and temporary discomfort was ordinarily to be expected from this kind of insect bite or sting upon an adult?

Answer: .....

Interrogatory No. 2 (l) (2)

If so, what?

Answer: .....

Interrogatory No. 2 (m) (1)

Was an ulcerated skin condition, or any other substantial or disabling injury or disease, a result normally and usually to be expected to an adult from the bite or sting of the kind of insect or bug here involved?

Answer: .....

Interrogatory No. 2 (m) (2)

If so, state exactly what effect could be normally and usually expected upon an adult from such an insect's bite or sting?

Answer: .....

[fol. 997] Interrogatory No. 2 (n) (1)

Has it been proved here that the B & O had prior reason or cause to anticipate or expect that one or more of its employees would be bitten or stung by this kind of an insect at the time and place in question?

Answer: .....

Interrogatory No. 2 (n) (2)

If so, state exactly why and how?

Answer: .....

Interrogatory No. 2 (o)

Has it been proved here that the B & O knew or should have known:

(1) That this insect was upon its premises?

Answer: .....

(2) That this insect had dangerous and injurious propensities toward humans?

Answer: .....

Interrogatory No. 2 (p)

Is it just as likely that the presence of the insect on Mr. Gallick's body was due to conditions off B & O property as to conditions on their property?

Answer: .....

[fol. 998] Interrogatory No. 2 (q)

Is it just as likely that the presence of the insect here involved was due to normal and usual conditions to be found in August on most industrial or vacant property near a city river, as to any particular conditions complained of on B & O property?

Answer: .....

Interrogatory No. 2 (r) (1)

Did the B & O have any reasonable cause to know or believe that the condition of its premises at the time and place here in question would probably result in injury of the kind here complained of to one of its employees?

Answer: .....

Interrogatory No. 2 (r) (2)

If so, state the cause for such belief, and the kind of injury to be anticipated.

Answer: .....

Interrogatory No. 2 (s) (1)

Did the condition of the B & O premises here present a danger to its employees that was substantially different or greater than the risk of insect bite by insects living elsewhere in the same vicinity?

Answer: .....

[fol. 999] Interrogatory No. 2 (s) (2).

If so, was the danger of an injurious insect bite still only a remotely possible danger?

Answer: .....

Interrogatory No. 2 (t)

Was the insect here involved a kind native to Ohio and living wild in nature?

Answer: .....

Interrogatory No. 2 (u) (1)

Did the B & O have prior notice or knowledge that the insect here involved was living on its premises in the area involved?

Answer: .....

Interrogatory No. 2 (u) (2)

If so, did the B & O have prior notice or knowledge that such insect had a natural propensity to attack man, and to cause a real and substantial injury as distinguished from a mere momentary and temporary discomfort?

Answer: .....

[fol. 1000] Interrogatory No. 3 (a)

Are the same kinds of bacteria found on and in rats and pigeons as are found on and in humans?

Answer: .....

Interrogatory No. 3 (b)

If "No" state the difference in kinds.

Answer: .....

Interrogatory No. 4 (a)

Was plaintiff's first skin infection due to a kind of bacteria known as staphylococcus?

Answer: .....

Interrogatory No. 4 (b)

If "No" state what kind of infection it was.

Answer: .....

Interrogatory No. 4 (c)

If "Yes" is this a common kind of bacteria found:

(1) On humans? .....

(2) On clothing? .....

(3) On tabletops? .....

(4) On floors? .....

(5) In the air? .....

(6) Practically everywhere? .....

[fol. 1001] Interrogatory No. 5 (a)

Where on plaintiff's body was his first skin infection?

Answer: .....

Interrogatory No. 5 (b)

Is it just as likely that such infection came from scratching or rubbing an insect bite or other skin eruption as from an insect bite itself?

Answer: .....

Interrogatory No. 6 (a)

Can you state the cause of Mr. Gallick's ulcerated skin condition?

Answer: .....

Interrogatory No. 6 (b)

If "Yes" so state.

Answer: .....

Interrogatory No. 6 (c)

If "Yes" state how such cause operated to produce Mr. Gallick's physical condition.

Answer: .....

[fol. 1002] Interrogatory No. 7 (a)

Was the plaintiff's place of work reasonably safe for the plaintiff?

Answer: .....

Interrogatory No. 7 (b)

If "No" state why.

Answer: .....

Interrogatory No. 8 (a)

Was plaintiff's place of work reasonably safe for a person in good health and without any unusual bodily conditions or allergy?

Answer: .....

Interrogatory No. 9

Did the B & O have any reason to know that Mr. Gallick was not in good health or had any abnormal bodily conditions or allergy?

Answer: .....

Interrogatory No. 10 (a)

Is plaintiff's physical condition since August, 1954, an allergic reaction, or other unforeseeable individual reaction, to an insect bite or sting?

Answer: .....

[fol. 1003] Interrogatory No. 10 (b)

If "No" state the medical cause of his condition.

Answer: .....

Interrogatory No. 11 (a)

Do you know how and why plaintiff's first ulcer developed?

Answer: .....

Interrogatory No. 11 (b)

If "Yes" state exactly how and why.

Answer: .....

Interrogatory No. 12 (a)

Do you know why plaintiff's first ulcer did not heal up routinely when treated?

Answer: .....

Interrogatory No. 12 (b)

If "yes" state why.

Answer: .....

Interrogatory No. 13 (a)

Do you know how and why plaintiff's other ulcers developed?

Answer: .....

[fol. 1004] Interrogatory No. 13 (b)

If "Yes" state exactly how and why.

Answer: .....

Interrogatory No. 14

List the items going to make up plaintiff's damages, and show the amount allowed for each item.

Answer: .....

Interrogatory No. 15

What is plaintiff's present life expectancy in view of his present condition?

Answer: .....

. . . . . .

[fol. 1038] Wednesday afternoon session,
1:00 p.m., June 24, 1959

(Proceedings were resumed in the absence of the jury, as follows:)

The Court: Upon reconsideration the Court now sustains Mr. Dudnik's objections to the introduction of the interrogatories presented by the defendant except for the following—and here are copies, gentlemen—5-a and 2-g-1.

As to 2-g-1, the Court now strikes from this question the word "it" and inserts in its place thereof the word "insect" so that the jurors may better understand the question.

In this case the Court has found that properly applied mandatory duties imposed upon it by the statutes of Ohio in conjunction with the Federal Employers Liability Act, under which this case is brought. Ordinarily a State's procedure of law which would divest the plaintiff in a Federal Liability Act case in a jury trial, has been held to be improperly applied when the plaintiff was denied a jury trial.

Keeping this in mind, the Court has prepared the special verdict in such a way that it conforms to the statutes of Ohio, and conforms to the requirements imposed by the cases under the Federal Employers Liability Act.

[fol. 1039] This means that the Court in reading Section 2315.16 of the Ohio Revised Code, in the light of the Federal Employers Liability Act, has considered the words "Each determinative issue to be tried by the jury," in its broadest possible form, so that the plaintiff will not be denied a complete and comprehensive finding by the jury, nor will the defendant be denied a right granted him by the statutes to have the jury make a special verdict.

This, therefore, limits the questions to be asked under Section 2315.16.

Gentlemen, in order not to confuse the jury, I have replaced Page 2 of the petition with a new Page 2, which will go with the pleadings to the jury. You each may have a copy.

Mr. Leasure: Note our exceptions to the Court's ruling on the special interrogatories.

Let the record show that the defendant at this time is withdrawing Interrogatory 2-g-1, for the reason that standing alone it is meaningless, and, secondly, standing alone it assumes something that is not admitted.

[fol. 1040] CHARGE OF THE COURT

COHEN, J.: Ladies and gentlemen of the jury, before I give you the special verdict and the necessary law in this case, may I preface my charge by saying to you that this has been an unusually prolonged case. It has lasted over two weeks and I want to commend you for your patience and sincere interest.

I have watched you folks during the entire course of this trial, and as has been commented on by counsel this is a very important duty that you have to render as jurors. The Court wants to thank you for your services.

I also want to thank counsel on both sides of the table for their courtesy in handling this case, and I want to say to the clients of counsel on both sides that they have been very well represented. Counsel have prepared the case sincerely and thoroughly.

Ladies and gentlemen of the jury, when requested by either party the Court is required to direct the jury to return a special verdict. Such a request has been made in this case, and the Court therefore instructs you to return a special verdict in writing upon all of the determinative issues in this case.

[fol. 1041] Many of you are familiar with the general verdict. So perhaps it will be clearer if the Court explains the difference between a general verdict and a special verdict.

A general verdict is one by which the jury simply makes a finding for the plaintiff or for the defendant. Under the general verdict procedure the Court furnishes a jury all of the law applicable to the case, and the jury applies that law to the facts, and determines which party is entitled to recover.

With a general verdict the jury is only required to express its conclusion for the plaintiff or for the defendant, and insert an amount if either party is entitled to money.

A special verdict is one by which the jury separately determines the issues, but does not make a general finding for either party.

In a special verdict the jury sets forth findings of determinative issues, determining all the issues which the case presents. The Court thereafter decides whether the plaintiff or the defendant is entitled to a judgment.

You are instructed that such a verdict must contain all [fol. 1042] the determinative issues in the case. In other words, by answering certain questions you will make findings of determinative issues that resolve the issues, and the Court will decide whether the final verdict is for the plaintiff or the defendant.

Facts which you fail to include in your verdict, or upon which you cannot agree, are considered as not established and may not be considered by the Court in applying the law and reaching a judgment for either party.

Since I have used the phrase determinative issues, I will attempt to explain that to you.

A special or determinative issue is a statement of ultimate fact controverted in an answer. Therefore, in coming to a conclusion as to what a determinative issue in this case is, you, the jury, must find facts from the evidence which have been presented in this court room.

The Court will furnish the jury with sufficient law to determine the credibility of witnesses, to weigh and determine the preponderance of the evidence, and in addition it will give to the jury such specific law as is necessary [fol. 1043] to enable the jury to determine the issues.

The Court will not furnish the general law of the case, since the general law of the case will be applied by the Court in rendering judgment.

This special verdict procedure provides for a separation of the functions of the Court and the jury.

Your deliberations will be concerned with a fair and impartial determination of the determinative issues, and not the result of your findings. Avoid all consideration as to which party may ultimately prevail.

The determinative issues in this case have been prepared in a series of questions which you will be expected to answer.

I will now read each of these questions to you. Most of the questions can be answered yes or no. A few of the questions being with the language, "If the answer to." These questions then refer to former questions which may have been answered yes. If the answer to the former question was yes, then answer the question you are considering either yes or no.

If the answer to the former question was no, then answer the question you are considering no answer necessary.

[fol. 1044] There is one question here, namely, question No. 17, which requires you to do more than answer yes or no. When you come to question No. 17, it is suggested that you again read the petition of the plaintiff before you attempt to answer this question.

I shall now read these questions to you.

We, the jury being first duly empaneled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

1. Did a pool of stagnant water exist under the Columbus Road bridge during the entire early part of August, 1954?

2. Was the pool of stagnant water on the premises of the defendant B & O?

3. If the answer to 2 is yes, was the defendant B & O in possession of the premises under the Columbus Road bridge whereon the stagnant water stood?

4. Did the defendant B & O have under its control the premises under the Columbus Road bridge wherein the stagnant water stood?

5. If the answer to question No. 2 is yes, did dead pigeons accumulate under the bridge in the stagnant water?

[fol. 1045] 6. If the answer to No. 2 is yes, did dead rats accumulate under the bridge in the stagnant water?

7. If the answer to No. 2 is yes, did vermin accumulate under the bridge in the stagnant water?

8. If the answer to No. 2 is yes, did bugs accumulate under the bridge in the stagnant water?

9. Was the plaintiff required to perform his work duties in close proximity to the area referred to in question No. 1?

10. On approximately August 10, 1954, was plaintiff bitten by an insect?

11. If the answer to question No. 10 is yes, was he bitten while performing his usual and customary work duties?

12. If the answer to No. 10 is yes, was he bitten near or about the Columbus Road bridge?

13. Did the defendant B & O provide the plaintiff, Mr. Gallick, a reasonably safe place to work under the facts and circumstances existing at the time?

Now, in dealing with the answer to this question, you must keep in mind that the Federal Employers Liability Act is not a scheme of workmen's compensation, nor does [fol. 1046] it make the railroad an absolute insurer of its premises.

By a safe place to work the Court instructs you as a matter of law, that in this case that means the railroad must maintain its tracks and premises in the same manner as a reasonable man ought to maintain them in the circumstances there prevailing, having in mind the standard of care must be commensurate to the dangers of the business, and is measured by what is reasonable and ordinary care and by what is reasonably foreseeable under the circumstances.

14. If the answer to question 1 is yes, did the defendant B & O know that by permitting the accumulation of said pool of stagnant water, dead pigeons, dead rats, bugs, and vermin would be attracted to said area?

15. If the answer to 14 is yes, did the defendant B & O know that its employees would have to work in this area?

16. Was the defendant negligent in one or more of the particulars alleged in the petition?

It is a general rule of law that negligence is never presumed, but that the party claiming negligence must prove the same by the greater weight or the preponderance of [fol. 1047] the evidence. You will recall that we have pre-

viously defined what is meant by the greater weight or the preponderance of the evidence.

Negligence is sometimes said to be a failure to observe for the protection of the rights of others that degree of care, precaution, and vigilance which the circumstances justly demand, and sometimes, in other words, it is said that negligence is the failure to observe ordinary care, and ordinary care is that degree of care which people of ordinary prudence and sagacity use under the same or similar circumstances. What would ordinarily prudent persons have done under like circumstances?

17. If the answer to question 16 is yes, indicate in the words of the petition the acts or omissions which constitute defendant's negligence.

18. Was the illness or disease from which Mr. Gallick now suffers caused in whole or in part by an insect bite sustained by him on defendant B & O's premises?

19. Were the injuries to the plaintiff proximately caused in any part, even the slightest, by any one or more of the acts or omissions of the defendant?

[fol. 1048] 20. If the answers to any one of the questions numbered 1, 5, 6, 7 and 8 is yes, was there any reason for the defendant B & O to anticipate that such would or might probably result in a mishap or an injury?

In answering this question you are instructed that it is a matter of law the defendant B & O is only to be held to a reasonable degree of care, and not to the performance of practicable impossibilities, but that where the proofs justify with reason the conclusion that the employer's negligence played any part, even the slightest, introducing the injury, then the employer has a duty to anticipate that such injury would or might probably result.

21. Is there a proximate causal relationship to the stagnant water, the dead rats, the dead pigeons, the insect bites, and the present physical condition of the plaintiff?

22. If the answer to question 21 is yes, was it within the realm of reasonable probability or foreseeability of

the defendant B & O to appreciate this proximat causal relationship between the stagnant water, the dead rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff?

[fol. 1049] 23. What amount of money will compensate the plaintiff, James J. Gallick, for his injuries and damages, if any, resulting proximately from this accident?

To assist you in your work, the Court is going to send to you the pleadings in this case. The pleadings consist of a so-called amended petition of the plaintiff, the answer to the amended petition of the plaintiff by the defendant, and a reply to that answer by the plaintiff.

The purpose of these pleadings is to narrow the issues between the parties. The Court will now read the pleadings to you.

I am now reading the amended petition of the plaintiff.

"Now comes the plaintiff and after having duly obtained leave of court files this, his amended petition.

"Plaintiff for his cause of action says that at all times herein alleged, the defendant was and is a railroad corporation, organized and existing under the laws of the State of Maryland, and was at the time of the occurrence herein set forth, and is now carrying on its business as an interstate common carrier of passengers and freight within the [fol. 1050] jurisdiction of this Court.

"That at all times herein alleged plaintiff was and is a resident of the City of Parma, County of Cuyahoga, and State of Ohio, employed by the defendant as a yard foreman in which capacity the plaintiff was engaged in the movement, switching, and classification of freight cars on tracks of the defendant located in the vicinity of Lime Road and the Columbus Road bridge in the City of Cleveland, County of Cuyahoga, State of Ohio.

"That the action of plaintiff is brought under and is governed by the provisions of the Federal Employers Liability Act, 45 U.S.C.A., Section 51-59, and amendments thereto.

"Plaintiff further says that in the month of August, 1954, the exact date and time being uncertain, he was engaged in the performance of his duties involving the movement, switching, and classification of railroad freight cars at

defendant's tracks located in the vicinity of Lime Road and Columbus Road bridge in the City of Cleveland, County of Cuyahoga, State of Ohio.

"That in close proximity to said tracks, in August of 1954, and for a long time prior thereto, to the knowledge [fol. 1051] of the defendant there existed a pool of stagnant water on premises in the possession of and under the control of defendant, into which was accumulated dead pigeons, rats, and various forms of bugs and vermin.

"That plaintiff was required to perform his work duties in close proximity to said area.

"That in the month of August, 1954, while performing his usual and customary work duties in and about the Columbus Road bridge and Lime Road tracks of the defendant, the plaintiff was bitten by an insect following which he developed serious painful and disabling injuries, as will be described hereinafter.

"Plaintiff further says that the defendant was negligent in the following respects:

"4. In that it failed to provide plaintiff with a reasonably safe place in which to perform his work duties.

"6. In that it knew that by permitting said pool of stagnant water to accumulate dead pigeons, rats, bugs, and vermin, insects would be attracted to said area, and that its employees would have to work under unhealthful and unsanitary conditions.

"Plaintiff further says that by means of and in con- [fol. 1052] sequence of the foregoing negligent acts and omissions of the defendant, and as the direct and proximate result thereof, he was caused to be bitten by an insect which caused his system to become poisoned, and which resulted in the formation of deep acute ulcerations, with drainage about his extremities and body, which condition has not abated with time.

"Plaintiff further says that as a result of his injuries it has been necessary for him to undergo extensive hospitalization, medical care and attention and surgery, for all of which he has sustained expense, the full extent and amount of which is as yet unascertainable, inasmuch as

plaintiff is receiving medical care and attention and hospitalization at the time of filing this, his amended petition.

"Plaintiff further says that his injuries have necessitated surgery for the amputation of both legs, that he is confined to his hospital bed, and a wheelchair, and will remain so into the indefinite future.

"Plaintiff further says that his injuries have caused him to suffer an extreme weight loss, and necessitated that he consume large quantities of narcotics in an attempt [fol. 1053] to relieve his pain.

"Plaintiff further says that as a result of his injuries he has suffered and will suffer permanently from pain, great mental anguish, extreme nervousness, and inability to obtain normal rest, weight loss, cosmetic disfigurement and inability to get about, and extreme worry, grief and anxiety.

"Plaintiff further says that his injuries have rendered him an invalid, and that he needs constant care and attention to his person.

"Plaintiff further says that prior to the foregoing occurrence he was regularly employed, earning and capable of earning substantial wages, but that as a result of his injuries as aforesaid he has been rendered totally incapacitated from resuming his railroad occupation or any other gainful occupation, which condition will continue into the indefinite future, by means of and in consequence of which plaintiff has been injured and damaged in the sum of $750,00.

"Wherefore plaintiff prays judgment from the defendant herein in the sum of $750,000," and signed by his attorney.

Answer to amended petition.

[fol. 1054] "First defense. Now comes the defendant and for his its first separate defense to plaintiff's amended petition, admits that it is a railroad corporation, organized and existing under the laws of the State of Maryland, and maintains certain tracks in the vicinity of Lime Road and the Columbus Road bridge in the City of Cleveland, Ohio.

"Admits that during the month of August, 1954, plaintiff was employed by defendant in the capacity of yard foreman and yard helper, engaged in the movement, switching and

classification of freight cars over certain tracks of defendant located in the City of Cleveland.

"Admits that plaintiff's cause of action is brought under the provisions of the Federal Employers Liability Act, 45 U.S.C.A., Paragraph 51-59, as amended, and admits that plaintiff's duties as a yard foreman and yard helper were in furtherance of interstate commerce.

"Not intending to deny that plaintiff may have been required in the course of his duties as yard foreman, or yard helper, to be present from time to time during the month of August, 1954, at or near the tracks of defendant [fol. 1055] which are located in the vicinity of Lime Road and the Columbus Road bridge, or that plaintiff has suffered from a serious and painful disability subsequent to August, 1954, defendant does deny for lack of knowledge that there existed at that time a pool of stagnant water or other unsanitary condition for which the defendant was responsible in the vicinity of its tracks at Lime Road and the Columbus Road bridge.

"Denies that plaintiff's illness or disease was proximately caused or contributed to by the negligence of the defendant, its agents, servants, or employees, either in the respects alleged in the amended petition, or in any other manner, and specifically denies the existence of any connection whatsoever between the condition of defendant's tracks and roadbed, and the insect bite allegedly sustained by plaintiff while employed as a yard foreman or yard helper for defendant during the month of August, 1954.

"Further answering, defendant says that if it be true that the illness or disease from which plaintiff now suffers was caused or contributed to by an insect bite sustained by him on defendant's premises or elsewhere, the likelihood [fol. 1056] of harm and consequences to plaintiff therefrom were beyond the realm of reasonable probability or foreseeability, with the result that no duty arose requiring the exercise of care by defendant to protect plaintiff from any such risk.

"And defendant further says that if it should be found that such risk should have been foreseen by this defendant, no reasonable method or means was available to it which

could have eliminated control or appreciably reduced the numbers or types of insects in and about its premises.

"Further answering, defendant denies each and every allegation contained in plaintiff's amended petition, save and except those hereinabove expressly admitted to be true.

"Second defense. For its second separate defense to plaintiff's amended petition, defendant incorporates herein by reference and makes a part hereof the preceding portions of this, its answer, and says that if it should be found that plaintiff's disability was caused in whole or in part by the negligence of this defendant, which defendant specifically denies, then neither said disability nor the insect bite which is claimed to have occasioned it, constitutes an [fol. 1057] injury within the meaning of the Federal Employers Liability Act, and that plaintiff may not recover in this action.

"Wherefore, having fully answered, defendant prays that plaintiff's amended petition be dismissed, and that it may go hence with its costs without day."

And signed by counsel for the defendant.

The reply of the plaintiff to the defendant's answer:

"For his reply to the answer of the defendant to plaintiff's amended petition, plaintiff denies each and every fact, statement, and allegation contained therein, save and except such as are an admission of a fact, statement or allegations contained in the amended petition of plaintiff.

"For his further reply plaintiff realleges and reavers the facts, statements, and allegations contained in his amended petition, and prays for judgment as in his amended petition he has prayed."

Ladies and gentlemen of the jury, when I read question No. 18 referring to determinative issues, I failed to give you the law that affects that question, and I now give the law to you.

You are instructed as a matter of law that the term injury as used here includes any illness, disease or condition of ill-being of the plaintiff which you find from the evi- [fol. 1058] dence the negligence, if any, of the defendant, even in the slightest degree, was a proximate cause. By

proximate cause the Court means direct cause of such injury, or that the injury must stand in the immediate relation of cause and effect.

In a reading of the pleadings we are thus able to determine certain issues which are not disputed. Therefore, you do not have to decide these issues and need not be concerned with them. The Court will now give you certain law to apply in this case.

First, as the sole judges of the facts you are also the sole judges of the credibility of the witnesses and the weight to be given their testimony.

In reaching a conclusion as to this, you have the right to and should consider the candor or lack of candor of each witness while testifying, his interest in the outcome of the lawsuit, his bias or lack of it, the probability of his knowing the truth of the facts and circumstances concerning which he has testified, and every other factor developed during the trial which will enable you to determine the degree of credibility which you will assign to each witness.

[fol. 1059] As a matter of law, you may believe a portion of the testimony of a particular witness and disbelieve the rest of the witness' testimony.

You are privileged to believe all of the testimony of a particular witness, or you may disbelieve all of the testimony of a particular witness.

There have been expert witnesses testified in this case, and you are to apply to their testimony the same tests that you apply to the testimony of other witnesses. And in addition thereto consider the experience, skill, and education, the knowledge and impartiality of this witness, and give to the testimony of each of them such weight as in your honest judgment it is fairly entitled to receive.

Hypothetical questions, that is, questions based on supposition have been propounded to the expert witnesses.

In order that this testimony shall be of any value, all of the facts which were assumed for the basis of forming such question, and for determining the opinion, should be found by you to be true. The truth of said supposition in the question contained is for your determination from the evidence.

Second, in this case it is incumbent upon the plaintiff to prove by the preponderance of the evidence the allegations [fol. 1060] in his petition.

By a preponderance of the evidence is meant simply the greater weight of the evidence, more convincing force and probative value. It is that evidence that carries the greater probability of truth, that you more readily believe, that is more convincing to your minds.

It does not necessarily mean the greater number of witnesses. It is your duty to carefully examine all of the evidence offered on both sides of any issue. Having done that, if the one having the burden, which is the plaintiff in this case, has evidence that carries more conviction to your minds, the greater probability of truth, is more convincing, then it may be said that he has proven those issues by a preponderance of the evidence.

But if in your minds the evidence is equal on any issue, the one having the burden of proof will fail, because he must have evidence in support of his claim that carries something more than evidence to the contrary, however slight it may be, before he can prove that issue.

Now, ladies and gentlemen of the jury, with reference to the determinative issues I have just read to you, and with [fol. 1061] reference to the questions of fact which are also in the form of questions, and with reference to the word evidence contained in any one of the special charges, which have been read to you prior to argument, and which will go with you to the jury room, you must determine these determinative issues, and the answers to the questions of fact, not upon speculation, but, rather, upon the greater weight of the evidence as I have just defined it to you.

Third, you will not consider or determine whether or not defendant is liable. You will determine the amount in money of the damages to which plaintiff would be entitled if the Court determines from your special verdict that the plaintiff may recover.

The fact that you determine an amount does not mean that you are awarding damages to the plaintiff, because whether damages are awarded depends upon the conclusions at law the Court draws from your determination of the issues.

The rule of law by which you will determine the amount is as follows:

You may and should consider the nature, extent and character of the injury suffered. You should also consider the pain and suffering the plaintiff has undergone, and [fol. 1062] such pain as you find he is reasonably certain to undergo in the future.

You should also consider any medical care that he has been put to. You should consider any permanent physical injury or permanent physical defect of any kind which you find he has received as a direct and proximate result of the injuries received.

You have a right, also, to consider mental anguish, suffering and pain that he has gone through or with reasonable certainty that he will continue in the future.

You should consider the reasonable value of any loss of wages which the plaintiff may have sustained to present, if any, and such future loss of wages if any you find with reasonable certainty plaintiff will sustain in the future; which sum, however, shall be reduced by you to its present value, but in no event may these damages exceed the amount of the plaintiff's prayer, $750,000.

The law requires that the jury make a separate finding on each of the determinative issues in this cause. The Court has prepared the questions on separate pieces of paper. Therefore, you may separately report on each question.

Thus, whenever at least nine or more of your members [fol. 1063] agree on an answer to any one of the questions, those of you who so agree will sign the answer to the question. The foreman, whether he agrees to the answer or not, will insert the answer

If there is a question the answer to which nine jurors cannot agree, you may temporarily pass such question, and proceed to answer the remaining questions. Later return and again consider any question you have passed.

If after a reasonable length of time nine jurors are finally unable to agree upon the answer to any question, you will answer such question by writing, "The jury cannot agree."

Do not let the foregoing become confusing to you. When nine jurors or more agree, then the question should be answered and signed. Therefore, some questions may be answered by only nine jurors. Some questions may be answered by all twelve jurors; and some questions may be answered "The jury cannot agree."

If during the trial the Court said or did something which you consider an indication of the opinion of the Court on any of the facts or determinative issues in dispute, you are instructed to completely disregard it.

In addition, you are reminded that the evidence comes [fol. 1064] from the lips of the witnesses on the stand, together with the exhibits that have been introduced in evidence, and any stipulations that have been entered into the record in this case as agreed to by counsel on both sides, and you will disregard any information that has come to your eyes and ears from outside this court room, especially any accounts of this case that may have appeared in the newspapers, or on and over the radio and television.

At the opening of the trial counsel for the plaintiff and counsel for the defendant gave to the jury opening statements for the purpose of outlining what they believed the evidence would disclose as the trial progressed.

Then when the presentation of the testimony was completed, their closing arguments summed up the evidence from the standpoint of each side, respectively, with a view to helping the jury reach a fair and proper conclusion. The Court instructs you that such statements and arguments are not evidence and not to be considered by the jury as such.

You were permitted to view the premises where the alleged incident occurred. You are instructed that what you saw on this view was not evidence and must not be [fol. 1065] so considered by you.

The view was taken with the purpose of giving you a sense of relation such as would enable you to better understand and apply the evidence as you heard it detailed.

This charge is not given for the purpose of having the Court participate in your deliberation, but for an entirely different purpose of explaining that part of the law which

you are to apply in determining the facts in dispute, and giving answers to the determinative issues in this cause.

The Court suggests that when you go to your jury room that you first consider the exhibits, the pleadings, and the special verdict submitted. Examine and read them over carefully. Take each individual question up in the order in which it comes, and arrive at a conclusion upon each and every question.

Then go on and answer each of the questions of fact, which are headed Interrogatories, and, as a matter of fact, there will only be one such question that you will have in your jury room, and that question reads as follows: It is titled 5-A. "Where on plaintiff's body was his first skin infection?"

You should confer with each other in your deliberations [fol. 1066] and give careful consideration to the views expressed by each juror.

Until your verdict is announced and accepted by the Court, you are not to disclose to anyone other than the members of the jury the status of your deliberations.

The Court will place in your possession the pleadings, the exhibits, the special instructions on the law, the special verdicts, and the questions of fact submitted. The foreman will retain possession of the records, including the verdict and return them to the court room.

You will retire to the room which is available for your deliberations. Select a foreman who can be either a man or a woman, and whenever nine or more of your number agree upon and sign all the special verdict forms, and the special findings required to be answered, you will make that fact known by rapping on the door and you will be returned to the court room.

Any question which you wish to pose to the Court must be reduced to writing and given to the bailiff.

Is there anything additional from counsel?

COLLOQUY RE: CHARGE OF THE COURT

(Thereupon the following proceedings occurred at the bench, outside the hearing of the jury:)

Mr. Leasure: On behalf of the defendant, we do not [fol. 1067] have any request for an additional charge.

However, I want to save my exceptions and enter objection to the charge that has been presented and the special verdict that has been submitted. I assume we can do that after the jury retires.

The Court: You will do that, when I completely finish you do it then.

Mr. Dudnik: Do you think that the Court ought to charge that the defendant has to prove its affirmative defense by a preponderance of the evidence?

Mr. Leasure: I thought that was covered, your Honor, either party.

Mr. Dudnik: Fine, if it is covered it is covered.

The Court: To be frank I don't remember, but I think I made it clear to the jury.

Mr. Dudnik: I won't press it, your Honor. I won't press it. Now, did you tell the jury—I think you said the same nine do not have to sign each. You said any nine.

The Court: Did I use the word same?

Mr. Dudnik: No, you did not. Now, Judge, you gave [fol. 1068] as a special charge: "If you find from the evidence that defendant is negligent, and such negligence was a proximate cause of damages to the plaintiff, then defendant is liable for all consequences proximately resulting from such negligence, even if you find from the evidence that defendant neither foresaw nor should have foreseen the extent or nature of such damage."

You gave the charge to the jury that is inconsistent with your interrogatory.

The Court: It is inconsistent?

Mr. Dudnik: With 22—I believe—with the special interrogatory.

Mr. Leasure: Note in the record that the defendant is objecting to any further charge on the subject, in the manner or form requested by the plaintiff.

Mr. Dudnik: "If the answer to the former question is yes, was it within the realm of reasonable probability or foreseeability of the defendant B & O to appreciate this proximate causal relationship between the stagnant water, the dead rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff?"

Now read that. I am just putting it up to the Court. [fol. 1069] I won't argue it.

The Court: I don't think they are inconsistent.

Mr. Dudnik: You don't think they are inconsistent. You could say with some harm to plaintiff, but here you say they don't have to foresee the end result, and here you say they have to foresee the end result.

The Court: I don't think it is inconsistent.

Mr. Dudnik: You do not?

The Court: No.

(Thereupon, the proceedings were resumed in the presence and hearing of the jury as follows:)

The Court: Since the first twelve members of the jury panel have been able to attend and are now ready to deliberate, it will not be necessary to call upon the 13th and 14th jurors for further service. Had any of the first twelve been incapacitated you would have taken his or her place. The Court thanks you for the civic duty you have rendered and permits you to step aside and be excused at this time. You may return to the jury room. I will ask you to refrain from expressing any opinion or discussing the case until the jury returns its verdict. Do you understand that? [fol. 1070] Do you understand? Thank you very much.

Ladies and gentlemen of the jury: You will now retire to the jury room. The bailiff will take along with you the pleadings, the interrogatory, the special instructions, and the special verdict.

Your first order of business, as I have instructed you, will be to elect a foreman and then begin your deliberations. Good luck to you. You may retire to the jury room.

(Thereupon the jury retired to consider the verdict.)

Mr. Leasure: At this time the defendant objects to the form and content of the special verdict, and also objects for the reason that it does not cover all necessary points of the case, and further objects for the reason that it includes some questions which are mixed questions of law and fact.

Further object to the Court reading from the pleadings and sending the pleadings to the jury, inasmuch as they cover and include questions other than factual questions, including mixed questions of law and fact, and some statements of law.

If I didn't say it before, we object to the form and content of the special verdict, and we take our exceptions to it, and a general exception to the charge of the Court.

[fol. 1071] Mr. Nurenberg: Show for the plaintiff a general exception to the form and content of the special verdict, special exception particularly show to question number 22, for the reason that it is not a determinative issue, the foreseeability of plaintiff's present bodily condition not being a determinative issue.

The Court: Let the record show that there is no objection on the part of counsel on both sides that the jury be instructed by the Court through its bailiff that they begin their deliberations tomorrow morning, without coming down, in the jury room, without coming to the court room.

Mr. Leasure: The exhibits then will be taken from the jury room up to their deliberation room?

The Court: From here, and that the exhibits will be delivered to the deliberating jury room, and the special instructions.

For the record, show that all these objections have been overruled.

[fol. 1072] Thursday morning session,
10:30 a.m., June 25, 1959

QUESTION SUBMITTED TO COURT BY JURY

(Thereupon the following proceedings were had in the Court's chambers:)

The Court: Let the record show that the jury has submitted a question to the Court, as follows:

"Is it a polic[illegible] of the B & O Railroad to have periodic examinations for their employees such as Mr. Gallick in his type of work? Purpose of question: To establish previous health record."

First, may I say, do I understand that counsel on both sides have agreed that it will not be necessary to call the jury down to give them the answer to this question?

Mr. Dudnik: I will agree to that.

Mr. Nurenberg: I agreed to that in your absence.

The Court: And the answer can be submitted to them through the bailiff in writing?

Mr. Dudnik: I agree to that.

Mr. Leasure: That is agreeable with the defendant.

The Court: Then, the answer that the Court is sub- [fol. 1073] mitting to the jurors at this time is as follows:

Dated June 25, 1959. "In answer to your question relating to periodic examinations of employees, this is a question of fact, and you will have to rely on your memory as well as the exhibits as to what facts were established by the evidence. Signed, Judge Victor Cohen."

Now for the record, did you want—

Mr. Leasure: Yes, your Honor, the defendant is objecting to the submission of that answer.

The Court: The objection will be overruled.

Mr. Leasure: And I would like the record to show that the defendant had submitted a proposed answer which we think is the one that should be given, which is as follows:

"Your question with regard to periodic examinations for B & O employees relates to a subject on which there is no evidence in the record. You are instructed to rely upon your own recollection of the evidence which was introduced in the case in your deliberations."

Mr. Nurenberg: Let the record show that the plaintiff [fol. 1074] objected to the proposed answer submitted by the defendant for the reason that it would involve the Court on commenting upon the evidence.

The Court: For the purpose of the record, too, gentlemen —don't leave—only in the interest of making it as comfortable and convenient as is possible for the jurors, I would like to have an understanding between counsel as to those times when the jury will be permitted to go to lunch, and if the jury should deliberate beyond today, and speaking of the time of adjournment for today, that it may not be necessary for counsel on either side to be present at the time the jury is sent to lunch and told to adjourn for the day.

Is there any objection to that? But, however the Court will notify both sides in sufficient time so they can be present if they so desire.

Mr. Nurenberg: May I ask a question, Judge? Would you then send them directly from the jury room to lunch, and then for the day, or bring them down here first?

The Court: I shall bring them down both at lunch time and at adjournment time.

Mr. Dudnik: I have news for you, your Honor. You will [fol. 1075] not have to call me. I will be here sweating out my baby.

The Court: We will call counsel anyway. But if for any reason counsel isn't here, do I understand that counsel has no objection that the Court send the jury on to lunch?

Mr. Leasure: We have no objection, your Honor.

The Court: And home at the end of the day?

Mr. Hadden: Can we have an indication as to what the times will probably be?

The Court: Well, probably 12:00, and about 4:30.

Mr. Dudnik: May I suggest this—and this is just throwing it out—that the bailiff tell the jury they can go to lunch when they want to, or not say anything about it.

The Court: That sounds like a convenient time, 12:00.

Mr. Leasure: I don't see why there should be any objection. It helps us to know when to be here or close by.

The Court: Well, let's say 12:00, and 4:30. But we will call you anyway.

[fol. 1076] Mr. Leasure: Fine.

4:25 p.m., Friday, June 26, 1959

(Thereupon the jury, after due consideration and deliberation, was returned to the court room and the following proceedings were had:)

The Court: Ladies and gentlemen of the jury, have you selected a foreman?

Juror No. 7: We have.

The Court: Who is the foreman?

Juror No. 7: I am.

The Court: Has the jury answered the questions that have been presented to them by the Court?

Juror No. 7: Yes, your Honor, with the exception of one question, your Honor.

The Court: Will you turn the questions and answers over to the bailiff, please.

At this time I would like to see counsel in my chambers, and may I say to the ladies and gentlemen of the jury, until such time as you are discharged will you please be seated, make yourselves as comfortable as you can. Do not talk about this case amongst yourselves, and certainly [fol. 1077] not to anybody in this room.

(Thereupon the following proceedings occurred in the Court's chambers:)

The Court: Question No. 1: Did a pool of stagnant water exist under the Columbus Road bridge during the entire early part of August, 1954?

The answer is yes.

Mr. Leasure: By all twelve?

The Court: By all twelve. Question No. 2: Was the pool of stagnant water on the premises of the defendant B & O?

Answer, yes. Twelve.

If the answer to 2 is yes, was the defendant B & O in possession of the premises under the Columbus Road bridge whereon the stagnant water stood?

The answer is yes. Signed by twelve.

Did the defendant B & O have under its control the premises under the Columbus Road bridge wherein the stagnant water stood?

Yes. Signed by twelve.

If the answer to Question No. 2 is yes, did dead pigeons accumulate under the bridge in the stagnant water?

The answer is yes. Signed by ten.

[fol. 1078] If the answer to No. 2 is yes, did dead rats accumulate under the bridge in the stagnant water?

The answer is yes. Signed by nine.

Question No. 7: If the answer to No. 2 is yes, did vermin accumulate under the bridge in the stagnant water?

The answer is yes. Signed by twelve.

If the answer to No. 2 is yes, did bugs accumulate under the bridge in the stagnant water?

The answer is yes. Signed by twelve.

Question No. 9: Was the plaintiff required to perform his work duties in close proximity to the area referred to in question No. 1?

Answer is yes. Signed by twelve.

Question No. 10: On approximately August 10, 1954, was plaintiff bitten by an insect?

Answer, yes. Signed by twelve.

No. 11: If the answer to Question No. 10 is yes, was he bitten while performing his usual and customary work duties?

Answer, yes. Signed by twelve.

If the answer to No. 10 is yes, was he bitten near or about the Columbus Road bridge?

Answer, yes. Signed by twelve.

[fol. 1079] Question No. 13: Did the defendant B & O provide the plaintiff, Mr. Gallick, a reasonably safe place to work under the facts and circumstances existing at the time?

Jury can't decide on this question. No signatures.

Question No. 14: If the answer to Question 1 is yes, did the defendant B & O know that by permitting this accumulation of said pool of stagnant water, dead pigeons, dead rats, bugs, and vermin would be attracted to said area?

Answer, yes. Signed by ten.

Question No. 15: If the answer to 14 is yes, did the defendant B & O know that its employees would have to work in this area?

Answer, yes. Signed by ten.

Question No. 16: Was the defendant negligent in one or more of the particulars alleged in the petition?

Answer, yes. Signed by twelve.

Question No. 17: If the answer to Question 16 is yes, indicate in the words of the petition the acts or omissions which constitute defendant's negligence.

And I will give you a little time to write this out. This [fol. 1080] is the answer: "There existed a pool of stagnant water on premises in the possession of and under the control of defendant, into which was accumulated dead pigeons, rats, and various forms of bugs and vermin."

Signed by ten.

Mr. Leasure: That was 17?

The Court: Right. Question No. 18: Was the illness or disease from which Mr. Gallick now suffers caused in whole or in part by an insect bite sustained by him on Defendant B & O's premises?

Answer, yes. Signed by twelve.

Question No. 19: Were the injuries to the plaintiff proximately caused in any part, even the slightest, by any one or more of the acts or omissions of the defendant?

Answer, yes. Signed by twelve.

Question number 20: If the answers to any one of the questions numbered 1, 5, 6, 7 and 8 is yes, was there any reason for the defendant B & O to anticipate that such would or might probably result in a mishap or an injury?

Answer, no.

Mr. Leasure: Signed by how many?

The Court: Signed by ten.

Question No. 21: Is there a proximate causal relation-[fol. 1081] ship to the stagnant water, the dead rats, the dead pigeons, the insect bite, and the present physical condition of the plaintiff?

Answer, yes. Signed by twelve.

Question No. 22: If the answer to Question 21 is yes, was it within the realm of reasonable probability or foreseeability of the defendant B & O to appreciate this proximate causal relationship between the stagnant water, the dead rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff?

Answer, no. Signed by twelve.

Question No. 23: What amount of money will compensate the plaintiff, James J. Gallick, for his injuries and damages, if any, resulting proximately from this accident?

Answer, $625,000. Signed by twelve.

Interrogatory 5-a: "Where on plaintiff's body was his first skin infection?"

Answer: Back of left leg approximately four inches above the knee, more to the outside. Signed by twelve.

Now, gentlemen, upon a review of these answers, do you believe that there are any answers to determinative issues that have been neglected and are now unanswered, other [fol. 1082] than the one that the jury returned unanswered?

Mr. Dudnik: No, sir.

Mr. Nurenberg: No, sir.

Mr. Leasure: I am not sure that I get the exact contents of the Court's question. As I understand it, the Court submitted a special verdict of 23 questions which the Court prepared?

The Court: That's right.

Mr. Leasure: And I don't know how the jury could answer any more questions than they did, with the exception of the one question they did not answer.

The Court: This is merely a formal question—

Mr. Dudnik: I think that is a verdict, your Honor. They have reached a verdict.

Mr. Leasure: We are not waiving our objection as we entered in the record at the time the special verdict was submitted We thought then and we still think it is an incomplete special verdict since it does not cover all dispositive issues. There is no use in repeating all that.

The Court: As far as you are concerned, you may have [fol. 1083] your objections. The Court has ruled on those.

Gentlemen, will you excuse us. I would like to ask one favor of you, that all the lawyers go out through this door and stay in the hall.

(Thereupon proceedings were resumed in the presence of the jury, as follows:)

The Court: Ladies and gentlemen of the jury, in view of the fact that the Court still has legal problems to con-

sider, and until such problems are resolved, the services of the jury will still be required.

The Court has made arrangements to take all of you to dinner. You will be in the custody of the bailiff.

You will return here to the jury box in the court room at 8:00, once more, with the admonition that you do not talk about this case to anyone, not even amongst yourselves during this period.

You are excused temporarily until the bailiff is prepared to take you to dinner. You will go with him.

(Thereupon the jury was excused, and the following proceedings were had in the absence of the jury:)

Mr. Leasure: I am not sure that I made our position [fol. 1084] clear in chambers and I want to do it now.

It is the defendant's position that the jury has answered all factual questions which were put to them. They had completed their duty, and the special verdict should be accepted as is.

Mr. Dudnik: I am of the same opinion, your Honor, that the special verdict should be accepted as is.

The Court: Well, the Court wants to think it over before it gives its answer.

[fol. 1085] 8:20 p.m., Friday, June 26, 1959

(Thereupon the jury was returned to the court room, and the following proceedings were had:)

The Court: Ladies and gentlemen of the jury, the Court is very appreciative of the time and effort that has gone into this case on the part of the jurors in this case. I think I sincerely recognize, as you do, that this has been an important case, a well-fought case, and the time has come for the Court's decision in this case.

I think in our voir dire that I made some mention of the fact that I knew of no service that any citizen of our community can render to our community or to our country that is more important than the service of acting as a

juror in either a civil or criminal case, unless it be the military.

You have been serious, you have been patient, and you have contributed much to this community by offering your services as jurors in this case and other cases that you may have sat in.

I think that as a result of this service that you will feel that you are better citizens for having served as jurors for the County of Cuyahoga. I want to thank you completely [fol. 1086] for your efforts in this case.

Your duties in this case are now completed, and you are discharged. You may remain if you desire while the Court renders judgment upon the finding that the jury has answered the determinative issues as follows, and I shall read them:

"We the jury being first duly empaneled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause."

1. Did a pool of stagnant water exist under the Columbus Road bridge during the entire early part of August, 1954?

The answer was yes, and this was signed by all twelve jurors.

2. Was the pool of stagnant water on the premises of the defendant B & O?

Yes, and signed by all twelve jurors.

3. If the answer to 2 is yes, was the defendant B & O in possession of the premises under the Columbus Road bridge whereon the stagnant water stood?

The answer was yes, and signed by all twelve jurors.

[fol. 1087] 4. Did the defendant B & O have under its control the premises under the Columbus Road bridge wherein the stagnant water stood?

The answer was yes, and signed by all twelve jurors.

5. If the answer to Question No. 2 is yes, did dead pigeons accumulate under the bridge in the stagnant water?

Yes, and signed by ten jurors.

6. If the answer to No. 2 is yes, did dead rats accumulate under the bridge in the stagnant water?

The answer is yes, and signed by nine jurors.

7. If the answer to No. 2 is yes, did vermin accumulate under the bridge in the stagnant water?

The answer is yes, and signed by twelve jurors.

8. If the answer to No. 2 is yes, did bugs accumulate under the bridge in the stagnant water?

The answer is yes. Signed by twelve jurors.

9. Was plaintiff required to perform his work duties in close proximity to the area referred to in Question No. 1?

Answer, yes, and signed by twelve jurors.

[fol. 1088] 10. On approximately August 10, 1954, was plaintiff bitten by an insect?

Answer, yes. Signed by twelve jurors.

11. If the answer to Question No. 10 is yes, was he bitten while performing his usual and customary work duties?

Answer, yes. Signed by twelve jurors.

12. If the answer to No. 10 is yes, was he bitten near or about the Columbus Road bridge?

Answer, yes. Signed by twelve jurors.

13. Did the defendant B & O provide the plaintiff Mr. Gallick a reasonably safe place to work under the facts and circumstances existing at the time?

Jury can't decide on this question.

14. If the answer to Question 1 is yes, did the defendant B & O know that by permitting the accumulation of said pool of stagnant water, dead pigeons, dead rats, bugs, and vermin would be attracted to said area?

Answer, yes. Signed by ten jurors.

15. If the answer to 14 is yes, did the defendant B & O know that its employees would have to work in this area?

Answer, yes. Signed by ten jurors.

16. Was the defendant negligent in one or more of the particulars alleged in the petition?

[fol. 1089] Answer, yes. Signed by twelve jurors.

17. If the answer to Question 16 is yes, indicate in the words of the petition the acts or omissions which constitute defendant's negligence.

Answer: There existed a pool of stagnant water on the premises in the possession of and under the control of defendant into which was accumulated dead pigeons, rats, and various forms of bugs and vermin.

Signed by ten jurors.

18. Was the illness or diseases from which Mr. Gallick now suffers caused in whole or in part by an insect bite sustained by him on defendant B & O's premises?

Answer, yes. Signed by twelve jurors.

19. Were the injuries to the plaintiff proximately caused in any part, even the slightest, by any one or more of the acts or omissions of the defendant?

Answer, yes. Signed by twelve jurors.

20. If the answers to any of the questions numbered 1, 5, 6, 7, and 8 is yes, was there any reason for the defendant B & O to anticipate that such would or might probably result in a mishap or an injury?

Answer, no. Signed by ten jurors.

21. Is there a proximate causal relationship to the stag-
[fol. 1090] nant water, the dead rats, the dead pigeons, the insect bite, and the present physical condition of the plaintiff?

Answer, yes. Signed by twelve jurors.

22. If the answer to Question 21 is yes, was it within the realm of reasonable probability or foreseeability of the defendant B & O to appreciate this proximate causal relationship between the stagnant water, the dead rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff?

Answer, no. Signed by twelve jurors.

23. What amount of money will compensate the plaintiff James J. Gallick for his injuries and damages, if any, resulting proximately from this accident?

Answer, $625,000. Signed by twelve jurors.

There was one interrogatory submitted to the jury which reads as follows: 5-a. Where on plaintiff's body was his first skin infection?

Answer: Back of left leg approximately four inches above the knee, more to the outside. Signed by twelve jurors.

Mr. Leasure: If your Honor please, may we have the jury polled on the answer to No. 23?

(Thereupon the jury was polled on the answer to No. 23.)

[fol. 1091] JUDGMENT FOR PLAINTIFF

The Court: The Court now enters judgment for the plaintiff in the amount of $625,000, and orders the plaintiff to prepare a Journal Entry as required in this cause.

Mr. Leasure: If your Honor please, we would like to have an opportunity to file a motion for judgment notwithstanding. Will we have the opportunity to do that? In other words, I want to preserve our rights to ask for judgment notwithstanding, and also to ask for judgment on the basis of the special verdict to which I think we are entitled to on the basis of the answers.

Mr. Dudnik: The Court entered judgment and you can go from there.

Mr. Leasure: I want to make sure now that I am making my position clear.

The Court: I recognize what Mr. Leasure has reference to.

Mr. Leasure: I wasn't aware that the Court was going to enter judgment right at this time before I could make my motion.

Mr. Dudnik: You can still file your motion.

[fol. 1092] The Court: I think Mr. Leasure wants to preserve the record, and the Court will entertain those motions.

As a matter of fact, the Court will withdraw the statement entering judgment at this time, permitting counsel for the defendant to make his motion.

Mr. Dudnik: I must enter an objection.

(Thereupon the following proceedings occurred at the Court's bench outside the hearing of the jury:)

Mr. Leasure: We have two things here. I don't know which is first or second, I think they both come at or about the same time.

But we have two things, one being that we are entitled to judgment notwithstanding the findings of the jury here. We are entitled to that as a matter of law on the basis of the record.

Secondly, we are entitled to judgment on the basis of the answers contained in the special verdict, and I want an opportunity to make both motions before any judgment is entered, your Honor.

Mr. Dudnik: If your Honor please, your Honor has a right to enter judgment—

Mr. Leasure: I want a chance to argue them and have them presented properly and formally, so that appropriate [fol. 1093] action can be taken after that.

Mr. Nurenberg: If I may be briefly heard, your Honor, I would think that by entering judgment O.S.J., Mr. Leasure's rights are fully protected, because up until the Journal Entry is signed he has ample opportunity to make any motions he wants to, and certainly arrangements can be made to withhold the signing of the journal entry which will formalize the judgment until he has made his appropriate motions, but the duty of the Court is to enter judgment.

The Court: Will you go along with that?

Mr. Leasure: No, your Honor. Why enter a judgment unless you mean to enter a judgment, and you can't—

Mr. Dudnik: Wait a minute. His Honor meant to enter a judgment.

Mr. Leasure: You can't make final decision until I have had a chance to make my motions and be heard.

The Court: Just a minute. We want to preserve this record so as to make certain everything is done in its proper order.

Mr. Dudnik: If I may be heard, your Honor.

[fol. 1094] The Court: Yes.

Mr. Dudnik: The defendant may be entitled to a judgment N.O.V., that means notwithstanding your judgment.

The defendant may be entitled to a verdict, for a new trial. The defendant may be entitled to—well, those are the two premises.

The Court: He hasn't mentioned anything about a motion for a new trial.

Mr. Leasure: I have ten days in which to file a motion for a new trial. That is a matter of statute. I am not mentioning that at this time.

Mr. Dudnik: But those will be heard and considered after the Court's judgment. The defendant's rights are not prejudiced by the Court entering a judgment. He can have his N.O.V. He can have his new trial.

The Court: Well, let me—

Mr. Leasure: I can't have a judgment on the special verdict unless I have a chance to be heard and argue it and then the Court decide it. That is all I am asking.

The Court: Let me get this straight now. The two motions that you have made—

Mr. Leasure: I want an opportunity to make them, your [fol. 1095] Honor. I am not making them formally at this time. But I am telling the Court that I expect to—

The Court: Well—

Mr. Leasure: And I would like a chance to present them formally and be heard on them. These are serious matters.

The Court: The two things that you have in mind; however, is a motion for judgment notwithstanding the order of the Court?

Mr. Leasure: No. We have a special verdict here. Now, what it means is a matter of opinion. But so far we just have a verdict in the form of a special verdict.

Now, I want a chance to make a motion for judgment notwithstanding the verdict. I also want a chance to make a motion for judgment on the verdict, and I think they should be presented and considered at the same time, perhaps the motion for judgment on the verdict should be presented first and argued first.

But I would like to do it at my own time. I am not going to choose the order at my peril.

Mr. Dudnik: But, your Honor, until your judgment is [fol. 1096] journalized those matters are open to the defendant. Your Honor can't enter a judgment O.S.J.

The Court: I want a few minutes to take under advisement the request—

Mr. Dudnik: Will your Honor send the jury home?

The Court: No. Let them stay here. I may want to talk to them.

Mr. Nurenberg: May I have a brief word?

The Court: Yes.

Mr. Nurenberg: I think this is exactly analogous to what a Court of Appeals does when it renders a judgment O.S.J. Nobody's rights are prejudiced in that event, and nobody's appeal to the Supreme Court can be taken until the prevailing side presents its Journal Entry.

The Court of Appeals renders its judgment, but it is rendered O.S.J., and none of the statutory time expires until the O.S.J. has been signed.

Mr. Leasure: I am not talking about statutory time, your Honor, at all.

The Court: I think I know what counsel for the defendant [fol. 1097] has asked. He has asked to be heard. He wants to make a formal motion for judgment notwithstanding the verdict, and a motion for judgment on the verdict.

Mr. Leasure: And the Court took me by surprise by entering judgment on this verdict without giving me a chance to make any motion or be heard on it.

Mr. Nurenberg: O.S.J.

The Court: The Court certainly didn't intend to take counsel by surprise.

Mr. Leasure: I want to keep my position clear.

The Court: And I do want to take under advisement, and I will try to have an answer for you in just a few minutes.

Mr. Dudnik: In other words, your Honor, what I say is your Honor may enter a judgment, but until it is journalized they have all their rights preserved.

The Court: I have heard you. I am making a decision.

Mr. Leasure: You can't enter a judgment, so why do it if you are not doing it?

[fol. 1098] The Court: The Court has considered the request by Mr. Leasure, counsel for the defense, and it is the Court's opinion that in rendering judgment as the Court did, it was done properly.

The Court has ordered counsel for plaintiff to prepare Journal Entries, one which will cover the special verdict, and one which will cover the finding of the Court, and the Court assures counsel for the defense that it will have every opportunity to file the motions that counsel for defense has referred to, and the proper hearing will be granted, providing of course the motions are filed within reasonable times.

Mr. Leasure: How long do we have, your Honor, to file this motion?

The Court: A week, ten days, sufficient time.

Mr. Leasure: There is one thing I don't understand. How can I file a motion for judgment on the special verdict when you have already rendered judgment on the special verdict?

That is, I would ask for judgment in favor of the defendant on the special verdict, and you have already rendered judgment for the plaintiff.

The Court: Because it has not been journalized, and [fol. 1099] until such time as it is journalized it is not officially an order of the Court.

Mr. Dudnik: That's right.

Mr. Leasure: Do I understand that the Court is passing judgment on the special verdict without giving me an opportunity to be heard on it?

Mr. Dudnik: You will be heard.

Mr. Leasure: On a motion for judgment.

The Court: You will be heard. If the Court is convinced otherwise, from what it has already done, of course, the Court may change its mind.

Mr. Leasure: Well, give me ten days to file a motion for judgment on the special verdict. I will file it in writing.

The Court: There is only one problem as I see it. The term of Court will be over on the 22nd of July. You want time to file your motion for a new trial, too. I am satisfied that you have ten days, Mr. Leasure, and I don't want to deprive you of that, but I would appreciate—

Mr. Leasure: Don't I have ten days after the judgment is formally entered on my motion for a new trial?

The Court: I think that is right, yes.

[fol. 1100] Mr. Nurenberg: After the Journal is signed.

Mr. Leasure: I wasn't mentioning that at this time.

The Court: I am saying to you now you have ten days to file these motions. If you can get them in sooner, the Court would appreciate it, that's all.

Mr. Leasure: In other words, I have ten days in which to file a motion for judgment on the special verdict?

The Court: Right.

Mr. Leasure: And I also have ten days in which to file a motion for judgment notwithstanding the verdict?

The Court: Right.

Mr. Leasure: All right.

[fol. 1101] And thereafter, to-wit, on the ..... day of ....., A.D. 1959, being within the time fixed and allowed by law, the defendant filed its motion for judgment on the special verdict, for the reasons and upon the grounds stated and set forth in said motion; which motion is a part of the record herein.

And thereafter, to-wit, on the ..... day of ...., at the same term of Court, the said defendant's motion for judgment on the special verdict was overruled by the Court, to which ruling of the Court counsel for the defendant then and there duly excepted.

And thereafter, to-wit, on the ..... day of ...., A.D. 1959, being within the time fixed and allowed by law, the defendant filed its motion for judgment notwithstanding the verdict, and its motion for a new trial, for the reasons and upon the grounds stated and set forth in said motions, which motions are a part of the record herein.

And thereafter, to-wit, on the ..... day of ...., at the same term of Court, the said defendant's motion for judgment notwithstanding the verdict, and motion for a new trial, were overruled by the Court, to which ruling of the Court counsel for defendant then and there duly excepted.

[fol. 1102] And thereafter, to-wit, on the ..... day of ....., A.D. 1959, pursuant to said special verdict of the jury, and finding of the Court, the Court entered judgment in favor of the plaintiff and against defendant, as appears of record in this case, to all of which counsel for defendant then and there duly excepted.

And thereafter, to-wit, on the ..... day of ...., A.D. 1959, being within the time fixed and allowed by law, the defendant filed its written notice of its intention to appeal. Praecipe for transcript of docket and journal entries filed by the defendant.

And thereafter, to-wit, on the 27th day of Nov., A.D. 1959, being within the time fixed and allowed by law, the said defendant filed with the Clerk of this Court, this, its Bill of Exceptions, and prayed that the same might be allowed and signed by the Trial Judge, and filed as and made a part of the record in this cause, but not spread at large upon the journal.

Receipt of said Bill of Exceptions is hereby acknowledged this 27th day of Nov. A.D. 1959.

Emil J. Masgay, Clerk of Courts, By David Kikstadt, Deputy Clerk.

[fol. 1103] JUDGE'S CERTIFICATE TO BILL OF EXCEPTIONS

And thereafter, to-wit, on the ..... day of ...., A.D. 1959, notice of the filing of this Bill of Exceptions was duly served upon A. H. Dudnik, attorney for the plaintiff, the plaintiff being the adverse party herein, by the Clerk of this Court.

And thereafter, to-wit, on the ..... day of ...., A.D. 1959, being not less than ten days after the notice of the filing of this Bill of Exceptions, and within five days after the expiration of such ten days, to-wit, ... days after the service of such notice, this Bill of Exceptions, together with all exceptions and amend-

ments filed thereto, was duly transmitted by the Clerk of this Court to said Trial Judge.

Receipt of said Bill of Exceptions and all objections and amendments filed thereto, is hereby acknowledged this 11th day of Dec. A.D. 1959.

Victor Cohen, Trial Judge.

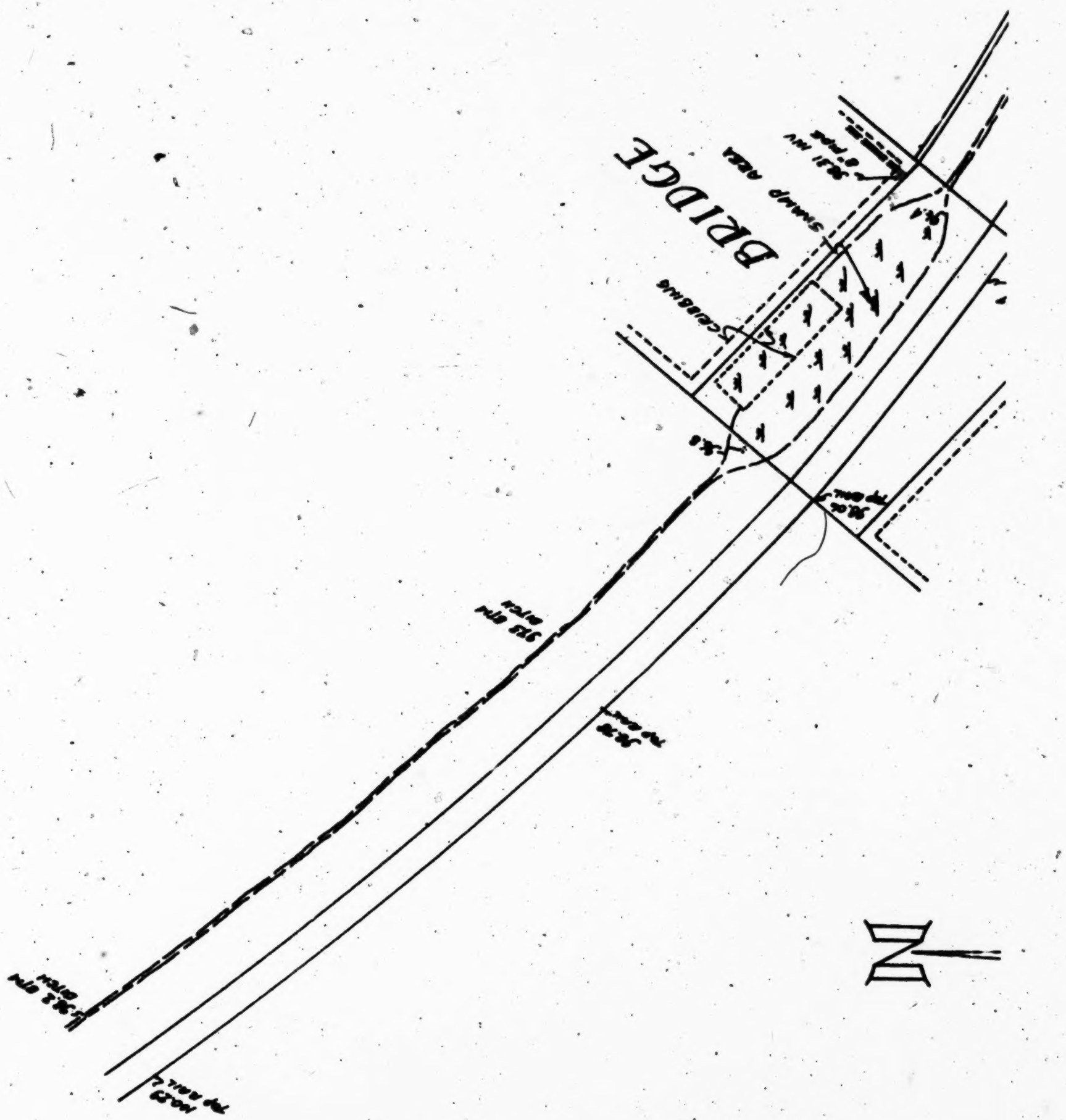
And thereafter, to-wit, on the 11th day of Dec., A.D. 1959, being within five days after the receipt of said Bill of Exceptions, together with all objections and amendments filed thereto from said Clerk, and within the time [fol. 1104] fixed and allowed by law, and upon due consideration of the same, this Bill of Exceptions is hereby allowed and signed by the Court, and it is ordered that the same be transmitted forthwith to the office of the Clerk of this Court, and that the same be filed as, and made a part of, the record in this cause, but not spread at large upon the Journal.

Victor Cohen, Trial Judge.

[fol. 1105a]

PLAINTIFF'S EXHIBIT 12

(See opposite) ☞


BRIDGE
Swamp area
Scaffolding
Old Mill Pond
Mill Pond
Old Mill Pond
Mill Pond
Old Mill Pond
Mill Pond
N

PLAINTIFF'S EXHIBIT 12

SURVEY OF AREA

UNDER & AROUND THE COLUMBUS ROAD BRIDGE

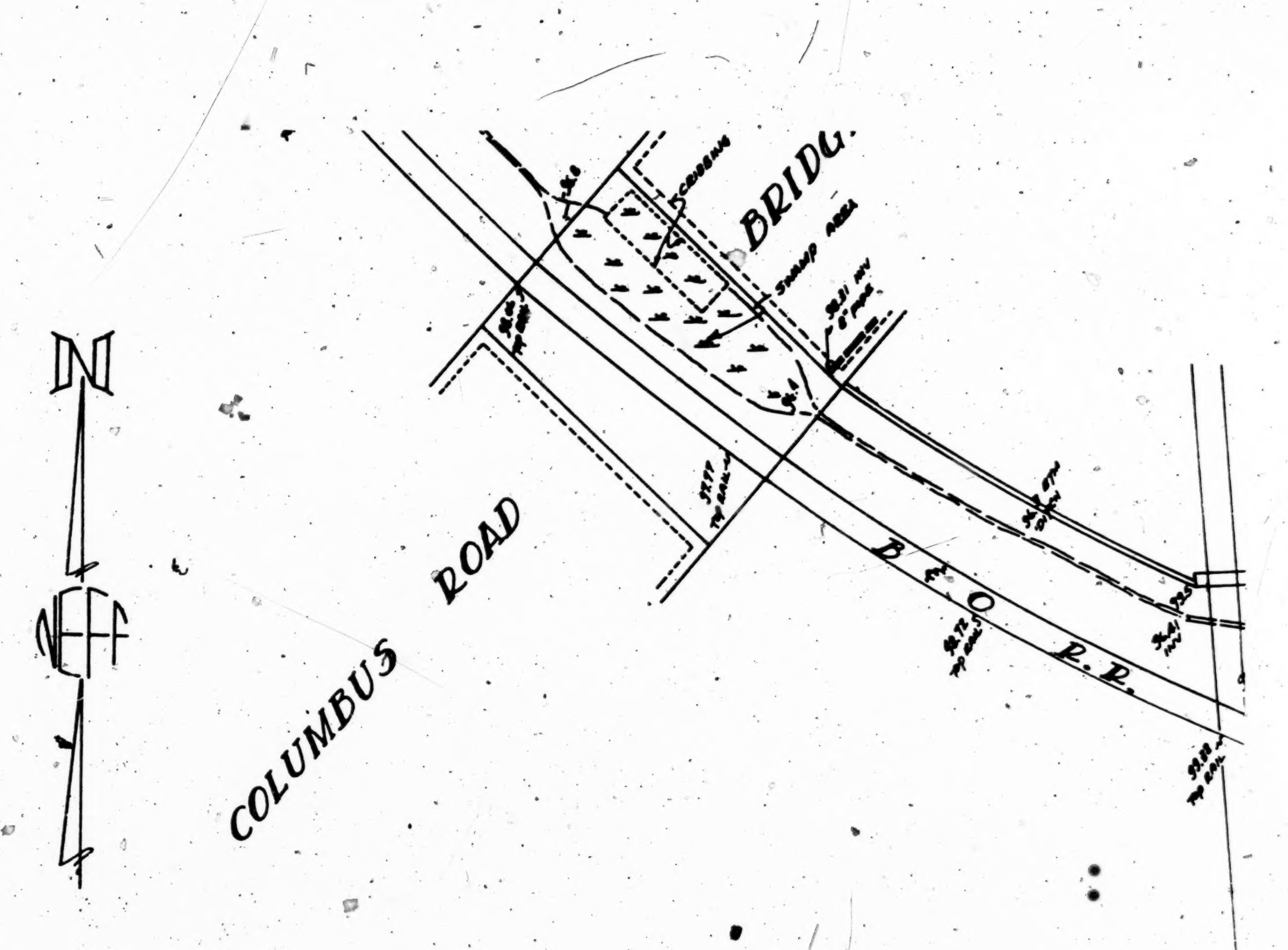
SCALE 1" = 20'

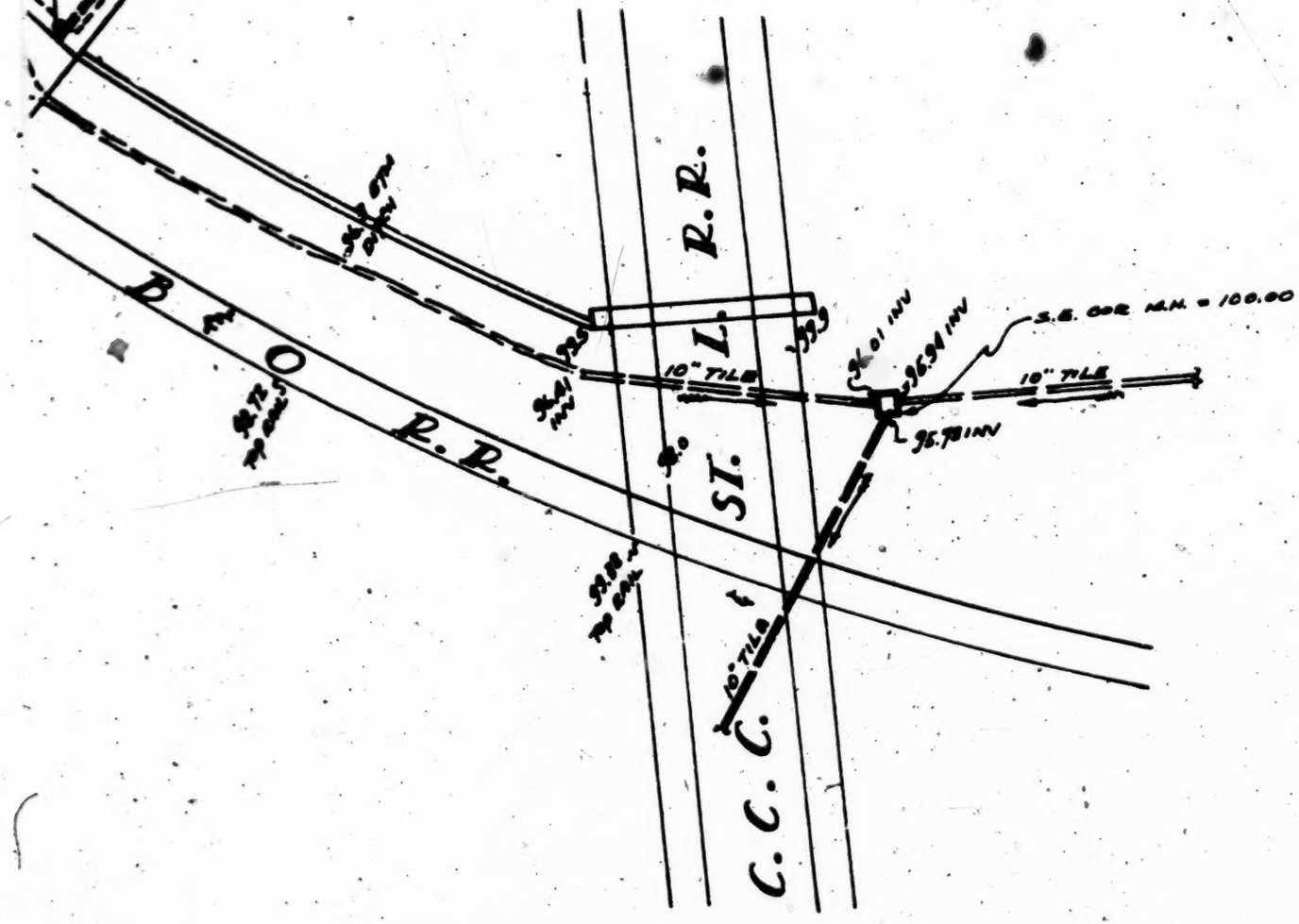
SURVEY JUNE 9, 1959

NEFF & ASSOCIATES

BY Carl W. Neff

REGISTERED SURVEYOR No 2544 OHIO
REGISTERED ENGINEER No 5905 OHIO


N
NEFF
COLUMBUS ROAD
BRIDG.
SCRUBBING
STAMP MILL
B & O R. R.


B & O
R. R.
R. R.
L.
ST.
C. C. C.
10" TILE
10" TILE
10" TILE
S.E. COR. M.H. = 100.00
96.94 INV
96.01 INV
95.78 INV

JOB. No 2793

[fol. 1105b]

PLAINTIFF'S EXHIBIT 13

(See opposite) ☞

No. 55143 / 5412722 ○ M ○ F

SUMMARY SHEET

MARYMOUNT HOSPITAL
GARFIELD HEIGHTS, OHIO

PATIENT'S LAST NAME: GALLICK | FIRST: JAMES | MAIDEN NAME:
ADMITTED: A.M. 1:30 | MO: September | DAY: 18 | YEAR: 1954

STREET: 4403 Dawshire | CITY: Parma | ZONE: | STATE: Ohio
BIRTHPLACE: Minn. | AGE: 53 | MO: July | DAY: 10 | YEAR: 1901

FLOOR: SP | ACCOMMODATIONS TYPE: 314-1 | RELIGION: Catholic | PARISH: St. Francis De Sales
DISCHARGED DATE: Dec. 8 1954 | HOUR: @ 11:00 AM

PHONE: S Tu 5-1066 | NATIONALITY: Bohemian | ATTENDING PHYSICIAN: Dr. Ippolito | RESIDENT OR INTERNE: DeCarlo

RACE	LAST PREVIOUS ADMISSION	MED	SURG	MAT	PED	PSYCH	T & A	OTHER
	Mayo		▼					

RESPONSIBLE PARTY: Mary | RELATIONSHIP: Wife | PATIENT ANOINTED | BY
ADDRESS: Same | CITY | TELEPHONE

SACRAMENTS RECEIVED | DATE

PROVISIONAL DIAGNOSIS

Ulcer Lt Popliteal Region
Possible malignancy

COMPLICATIONS

FINAL DIAGNOSIS

Pyoderma Granulosa Lt Leg
Popliteal Region (origin) & neck
thorax & legs

RESULTS Recovered ( ) Improved ( ) Unimproved ( ) Not Treated ( ) in for Diag only ( ) Died ( ) Autopsy ( )
Consultation C. L. Zipkin, M.D.

Infection on Admission ( ) in Hospital ( ) Not Infected ( )

OPERATIONS

1) multiple biopsies & excision of pyoderma Granulosa & Skin Graft

12-7-16 L

Wm Ippolito
ATTENDING PHYSICIAN

MC

APPROVED BY MEDICAL RECORD COMMITTEE PER

COMPLETE PERMANENT RELEASE SIDE

[fol. 1105b]

PLAINTIFF'S EXHIBIT 13

DATE September 18, 1954

AUTHORIZATION FOR
MEDICAL AND SURGICAL TREATMENT:

Upon the admission of James Gallick to MARYMOUNT HOSPITAL, I hereby give permission to the physician and the authorities of the above named hospital to administer any medical or surgical treatments (including anesthesia) deemed necessary and proper for the treatment of this patient. I hereby acknowledge that MARYMOUNT HOSPITAL is not responsible for any clothing, jewelry or other valuables retained by my while in the hospital.

WITNESS: Sister Mary Dulcina SIGNED James Gallick

WITNESS: RELATION TO PATIENT self

RELEASE FROM RESPONSIBILITY FOR ABORTION: DATE

I, the undersigned, a patient applying for admission to MARYMOUNT HOSPITAL, believe that I am in a condition of abortion. I hereby declare that neither the attending physician nor any person employed by or connected with the said hospital has knowingly performed any act which may have contributed to the induction of the abortion

WITNESSES: SIGNED

RELEASE FROM RESPONSIBILITY FOR DISCHARGE: DATE

This is to certify that I, a patient in MARYMOUNT HOSPITAL, am being discharged against the advice of the attending physician and of the hospital authorities. I acknowledge that I have been informed of the risk involved and hereby release the attending physician and the hospital from all responsibility for any ill effects which may result from such discharge.

WITNESSES: SIGNED

NOTE: *In case the patient is a minor, the above certificate must be signed by the parent or guardian who removes the patient from the hospital; otherwise it is signed by the patient*

PSYCHIATRIC TREATMENT:

This is to certify that I have been completely informed of the dangers as well as the possible benefits of Electric Shock and of Insulin Therapy and I hereby authorize Doctor and MARYMOUNT HOSPITAL to proceed with these treatments on (Patient's Name) as in their judgment seems best.

With full knowledge of the exigencies, dangers, and risks involved in consideration for the administrations of the treatments by MARYMOUNT HOSPITAL, its employees, officers and agents, we the undersigned hereby waive all claims which arise by reason of injury to the patient's person or loss of life resulting from the treatments. We do hereby assume full responsibility for the administration of the treatments and the results thereto. We agree to indemnify and hold harmless said MARYMOUNT HOSPITAL, its officers, employees or agents.

With full knowledge of the exigencies, we hereby waive any and all claims which might otherwise arise by reason of injury to the patient's person or property, or by reason of loss of property or life whether caused by the act of patient, other patients, officers or employees of MARYMOUNT HOSPITAL or otherwise, and expressly consent to total or partial restraint of patient and we hereby indemnify and agree to hold harmless MARYMOUNT HOSPITAL, its officers and employees from any claim or liability arising in any manner by reason of any such restraint, injury, loss or otherwise.

DATE SIGNED RELATION

WITNESSES SIGNED RELATION

I, bearing the relation of

to (Name of Patient) a deceased patient at MARYMOUNT HOSPITAL, do hereby grant the authorities of MARYMOUNT HOSPITAL to release the remains of the above patient to

(Undertaker's Name and Address) who is authorized to call for same at A.M. P.M.

(Date)

WITNESS SIGNATURE

MARYMOUNT HOSPITAL
Garfield Heights, Ohio

HISTORY AND PHYSICAL EXAMINATION

55143

Name Gedrick, James Age 53 Sex male Room 314-1 Hospital No. 541722

Physician Dr. Appleton Service Surgical Date 9/11

Chief complaint = ulcer on lt leg.

Present Illness - this 53 year of age white male is admitted with the C C of ulcer on lt thigh. Pt states that he was bitten by insect about 6-7 weeks ago with abscess formation which was open and drained by family physician. the ulcer small at the beginning & gradually began developing the last days prior to admission. Denies fever and pain.

Past history - Previous surgery = Tonsilectomy
Previous penicillin allergy - none
Pt has history of chronic anxiety
Habits = Smoke (-), Drinks (-)

Review of systems - G I = good appetite
regular BM
C-P = neg
Nervous = neg

— Physical —

~~W M~~ W N W D, ambulatory, WN in no distress

BP = 200/120, pulse 70, temp 98

1105D

Signature L. J. Marilla M. D.

[fol. 1105d]

History and Physical Examination Continued

Heart = negative

ENT = neg

Chest = Heart and lungs = negative findings.

abdomen = Soft, no tenderness no scars
nor masses

Extremities - Presence of 5 cm diameter ulcerated
area lower third, ~~left~~ anterior surface of Lt. thigh,
chronically infected with necrotic tissue
and moderate yellowish drainage.

~~Genitalia = neg~~

Impression = ulcer on Lt thigh,
chronically infected.

1105E

No. P 55143 ○ M X ○ F

SUMMARY SHEET

MARYMOUNT HOSPITAL B-1
GARFIELD HEIGHTS, OHIO

PATIENT'S LAST NAME	FIRST	MAIDEN NAME	ADMITTED A.M. P.M.	MO	DAY	YEAR
GALLICK	JAMES		4:00	January	4	1955

STREET	CITY	ZONE	STATE	BIRTHPLACE	AGE	MO	DAY	YEAR
4403 Dawshire	Parma		Ohio	Minn.	53	July	10	1901

FLOOR	ACCOMMODATIONS TYPE	ROOM	BED	RELIGION	PARISH	DISCHARGED DATE	HOUR
3E	W	301	4	Catholic	St. Francis De Sales	3-8-56	@ 11:30 A.M.

PHONE	NATIONALITY	ATTENDING PHYSICIAN	RESIDENT OR INTERNE
Tu.5-1066	Bohemian	Ippolito	Dr. Lee

RACE	LAST PREVIOUS ADMISSION	MED	SURG	MAT	PED	PSYCH	A A	OTHER	SACRAMENTS RECEIVED	DATE
W	9-18-54		X							

RESPONSIBLE PARTY	RELATIONSHIP	PATIENT ANOINTED	BY
Mary	Wife		

ADDRESS	CITY	TELEPHONE
Same as above		

PROVISIONAL DIAGNOSIS: Pyoderma - Gangrenosa - Secondary to Insect Bite

COMPLICATIONS:

FINAL DIAGNOSIS: Same.

381 - 10 .1 ✓
1 ✓
690 5 ✓

RESULTS: Recovered ( ) Improved ( ) Unimproved ( ) Not Treated ( ) in for Diag only ( ) Died ( ) Autopsy ( )
Consultations by: Drs. Bartunek, and Kozikowski

Infection: on Admission ( ) in Hospital ( ) Not Infected ( )

OPERATIONS: none

W Ippolito M.D.
ATTENDING PHYSICIAN

APPROVED BY MEDICAL RECORD COMMITTEE PER _____ M.D.

COMPLETE PERMIT ON REVERSE SIDE

[fol. 1105f]

PLAINTIFF'S EXHIBIT 14

DATE Jan 4, 1955

AUTHORIZATION FOR
MEDICAL AND SURGICAL TREATMENT

Upon the admission of James Gallick to MARYMOUNT HOSPITAL, I hereby give permission to the physician and the authorities of the above named hospital to administer any medical or surgical treatments (including anesthesia) deemed necessary and proper for the treatment of this patient. I hereby acknowledge that MARYMOUNT HOSPITAL is not responsible for any clothing, jewelry or other valuables retained by my _____ while in the hospital.

WITNESS M Sopher SIGNED Mary N. Gallick

WITNESS _____ RELATION TO PATIENT Wife

RELEASE FROM RESPONSIBILITY FOR ABORTION DATE _____

I, the undersigned, a patient applying for admission to MARYMOUNT HOSPITAL believe that I am in a condition of abortion. I hereby declare that neither the attending physician nor any person employed by or connected with the said hospital has knowingly performed any act which may have contributed to the induction of the abortion.

WITNESSES _____ SIGNED _____

RELEASE FROM RESPONSIBILITY FOR DISCHARGE DATE _____

This is to certify that I, _____, a patient in MARYMOUNT HOSPITAL, am being discharged against the advice of the attending physician and of the hospital authorities. I acknowledge that I have been informed of the risk involved and hereby release the attending physician and the hospital from all responsibility for any ill effects which may result from such discharge.

WITNESSES: _____ SIGNED _____

_____ NOTE: *In case the patient is a minor, the above certificate must be signed by the parent or guardian who removes the patient from the hospital; otherwise it is signed by the patient.*

PSYCHIATRIC TREATMENT:

This is to certify that I have been completely informed of the dangers as well as the possible benefits of Electric Shock and of Insulin Therapy and I hereby authorize Doctor _____ and MARYMOUNT HOSPITAL to proceed with these treatments on _____ (Patient's Name) as in their judgment seems best.

With full knowledge of the exigencies, dangers, and risks involved in consideration for the administrations of the treatments by MARYMOUNT HOSPITAL, its employees, officers and agents, we the undersigned hereby waive all claims which arise by reason of injury to the patient's person or loss of life resulting from the treatments. We do hereby assume full responsibility for the administration of the treatments and the results thereto. We agree to indemnify and hold harmless said MARYMOUNT HOSPITAL, its officers, employees or agents.

With full knowledge of the exigencies, we hereby waive any and all claims which might otherwise arise by reason of injury to the patient's person or property, or by reason of loss of property or life whether caused by the act of patient, other patients, officers or employees of MARYMOUNT HOSPITAL or otherwise, and expressly consent to total or partial restraint of patient and we hereby indemnify and agree to hold harmless MARYMOUNT HOSPITAL, its officers and employees from any claim or liability arising in any manner by reason of any such restraint, injury, loss or otherwise.

DATE _____ SIGNED _____ RELATION _____

WITNESSES _____ SIGNED _____ RELATION _____

_____

I, _____ bearing the relation of _____

to _____ (Name of Patient) a deceased patient at MARYMOUNT HOSPITAL, do hereby grant the authorities of MARYMOUNT HOSPITAL to release the remains of the above patient to

_____ (Undertaker's Name and Address), who is authorized to call for same at _____ A M _____ P M

_____ (Date)

WITNESS _____ SIGNATURE _____

ADDRESS _____ ADDRESS _____

B-2

MARYMOUNT HOSPITAL
Garfield Heights, Ohio

HISTORY AND PHYSICAL EXAMINATION

Name Gallick, James Age ___ Sex Male Room 301-4 Hospital No. 55-143

Physician Dr. Ippolito Service Surg Date 1-4-55

This 55 years old white, married, Ital. male to the 3rd floor of Marymount Hospital at 3 P.M. on January 4th-55 by Dr. Ippolito.

① Patient had "Biopsy of ulcer of left leg in this hospital on September 22-54.

② Patient had been done "Excision of ulcer of left popliteal region" on September 28-54.

③ Skin-graft: split-thickness on Oct. 18-1954.

④ Excision of lesion of the left side of the neck on October 27-54.

⑤ "Excision of multiple ulcers." on November 23-54.

⑥ "Acute and chronic inflammation with ulceration of skin" given by pathological examination. On November 24-54.

⑦ On September 20-54, the EKG showed "an abnormal record showing some myocardial ischemia and impairment. No evidence of infarction.

The final diagnosis given "Pyodermia gangrenosa" and patient discharged.

Interval note

Head: normal.
ears: No discharge.
Nose: no obstruction, no discharge.
Throat: negative.
Neck: soft.
Chest: symmetry.
Lungs: no rales or rhonchi.
Heart: no murmurs at present.
Abdomen: soft, no tenderness.

GALLICK JAMES
55143 Ippolito
53 yrs Room Bed 1 (over)

Signature _____ M. D.

and Ippolito MD

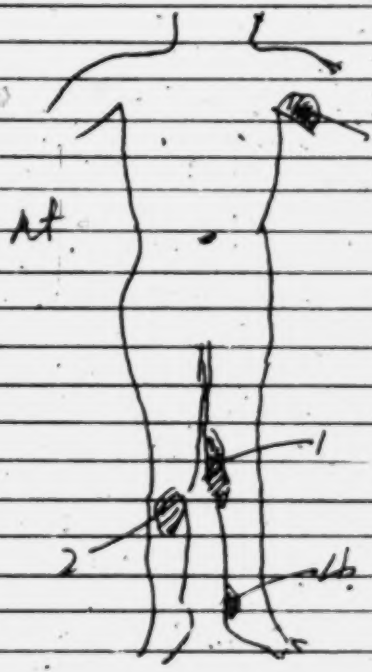
[fol. 1105h]

Liver and spleen not made out.

Extremities: Multiple ulcers on the left axillary region, on the left popliteal region, left achilles region, and at knee. The edge of the ulcer is thin, undermined, outlook like the ulcer of TB.

Reflexes: physiological.

Impression:
pyoderma granuloma lesion of left axillary region, left popliteal region, left achilles tendon region and at knee.



The areas of pyoderma granuloma (1, 2, 3, and 4.)

11051

9.23.55 55143 B-20

Patient was presented to the Cleveland Dermatologic Society as a case of Pyodirma Gangrenosum secondary to insect bite. The diagnosis was accepted & considerable discussion ensued. Many suggestions were offered, all of which have already been employed. The consensus seemed to feel that Ms. Gallick is doing better than the usual case of this type.

Discussions as to mechanism of action centered around either arthus or Schwartzman's phenomenon; as we have believed to be true earlier and to date. The group suggested close follow-up on chest lesion which will be done.

I have been requested to give monthly report to the Society on progress of this dermatological condition.

Dr. Brunsting recently reported (J. of Ohio State Med. Assoc. (Dec, 1954)) use of nitrites of Sal. acid & sulfa pyridine as being occasionally useful; this therapy will be instituted when it is available.

Sol Ziskowitz, M.D.

GALLICK JAMES
55143 Ippolito
53 yrs Room Bed 3

[fol. 1105]

591

MARYMOUNT HOSPITAL
Garfield Heights, Ohio

CONSULTATION RECORD

Date _____ Hospital No. _____

Name _____ Age _____ Sex _____ Room _____

Referred by Dr. _____ to Dr. _____
(Attending Physician) (Consulting Physician)

Findings: _____

Diagnosis: _____

Recommendations: _____

Date _____ _____ M. D.
(Consultant's Signature)

B-21

MARYMOUNT HOSPITAL
Garfield Heights, Ohio

CONSULTATION RECORD

Date 7/23 Hospital No. 56143

Name James Gablick Age 54 Sex M Room 301 S

Referred by Dr. Dr. Appolito (Attending Physician) to Dr. Dr. Bartunek (Consulting Physician)

Findings: 53 year old male with disturbances as noted on the nursing progress sheet.

This patient has a chemotactic dermal granulomatous tissue reaction - according to his history, all beginning with an insect bite.

He has also periods of absolute eosinophilia with leucocytosis - at times when he is not taking steroids.

He has an increase in blood protein and an increase in globulin on electrophoresis.

Believe the pulmonary lesion is a "metastatic" granuloma similar to the ones on the skin. It is possible that the steroids have quieted activity in a quiescent tuberculosis but this, in this patient, is unlikely.

Diagnosis: Feel that the G.I. Bleeding is from a duodenal ulcer which developed during use of Butazolidin

Recommendations: ① Progress films of lungs. Sputa examinations for acid fast organisms. If can be made to present after 7-10 days, then would treat this problem as a granulomatosis - like change with allergic dermal and visceral pruritis as part of the process. With these in mind I would strongly feel that this problem as a symptomatic disease using Nitrogen Mustard I.V.

② Paper Electrophoresis test may be better able to classify this disease according to protein patterns and if it is in phase of lymphomas and lymphoma then Nitrogen Mustard certainly should help.

Date 23 July 55 Thank you (Use Hospital Signature) Robert R Bartunek M.D.

[fol. 1105]

583

HIGHLAND VIEW

ADMISSION HISTORY

10,104

GALLICK,	JAMES			I	JULY	21	1958		
(From: from Cleveland Clinic)									
4403 Devonshire Drive, Parma,		Ohio	Minneapolis, Minn.	July	10,	1901	57		
SKI									
		Marital Status							
White	Male	Catholic	Married	A	2-A	EOJ	2	Home	

Mrs. Mary Gallick - Wife - 4403 Devonshire Drive, Parma, TU 5-1066.

Admission xxxxxx es

Additional xxx es

PLAINTIFF'S EXHIBIT 18

INTERVAL SUMMARY OF HOSPITAL COURSE AND TREATMENT

June 5, 1959

This 58 year old white male was received June 21, 1958 at Highland View Hospital following his transfer from Cleveland Clinic. Both lower extremities were absent to the level of the genitalia, and while the left amputation stump was well healed without cutaneous lesions, the right amputation stump which had been created approximately one month before his transfer here was superficially infected and unhealed along the line of the incision. The patient's transfer diagnosis and the name of the disease necessitating the leg amputations was recorded as pyoderma gangrenosa. The sources of information concerning this patient's past medical history have been the patient, his wife, copies of medical records from Marymount Hospital, the application for admission to Highland View Hospital submitted by Dr. Humphries of the Cleveland Clinic and telephoned information from Cleveland Clinic. Thus far we have not had direct access to this patient's medical record or summaries of his medical record from Cleveland Clinic. We have gained the information pertinent to his medical care and management by telephone from this source.

By history, the first recognized evidence of disease occurred in 1954 on the left lower extremity at the site of an insect bite. His subsequent course over the period of the next four years was apparently characterized by progressive cutaneous gangrene of the skin, predominently of the lower extremities but also involving other lesions over the trunk and upper body some of which were superimposed on donor sites for skin grafts taken to cover lesions over the lower extremities, but other lesions have also appeared and finally healed which were not so clearly related to known injury to the skin. At the time of his admission to Highland View Hospital, there were no skin ulcerations over any site other than the vicinity of the surgical scar over the right thigh amputation stump. The upper right arm was slightly swollen over the triceps region in the area commonly used for intramuscular injections and medications, but there was no evidence of skin disruption at this time.

The initial picture presented to us by this patient, coupled with the various sources of medical history yielded the impression that we were dealing with an individual who had consistently demonstrated a very unusual problem in healing due either to the activity of an unusual infectious agent or agents, not specifically identified, or due to a combination of some intrinsic systemic disorder coupled with infection. Available records indicated that exhaustive efforts had been made at the other institutions to diagnose any unusual infections, other disease, or abnormal conditions known to be associated with poor skin healing.

The patient's course during the first two months in this hospital was characterized by increasing evidences of disease, reflected by progressive enlargement of the wound over the right thigh stump, the dominant features of which were skin necrosis and purulent wound drainage, the appearance of skin necrosis over the upper right arm where swelling had been previously noted, and development of a small cutaneous ulceration over the lower abdomen. There was a progressive decline of his strength and general vitality and the physicians responsible for his care became concerned for his immediate survival of this episode. Several therapeutic measures were instituted within a brief period of time which were followed by improvement, but which, because of the pressure of the circumstances, were not applied in sequential order and therefore, the relative merits of

[fol. 1105]

various procedures could not be later evaluated. The patient was given a number of blood transfusions, dietary supplements, and increased doses of multiple vitamins. Dr. William Chamberlin, our Pathologist, had reviewed slides of skin lesions prepared at Marymount Hospital and had noted large thread-like structures which he believed were strongly suggestive of microfilariae, although their appearance was not diagnostic. In spite of the fact that examination of fresh wound drainage from the patient at this time disclosed no similar structures and furthermore, no one connected with the problem had knowledge of a disease caused by microfilaria which produced the features of Mr. Gallick's problem, it was decided to give him a trial of treatment with Hetrazan which is known to be highly affective against organisms of this type. Generalized improvement was noted in the patient over the period of the next two months, as well as evidence of healing of his local wounds following the combination of therapy enumerated above, coupled with intensive local care of the wounds from day to day. Immediately prior to this interval of generalized improvement, the patient had been transferred to the Surgical Constant Care Division of the hospital, primarily for the reason that he required greater amounts of nursing care and attention than could be practically provided on one of the regular hospital divisions. It is here that he has remained and been under observation for the last ten months.

During this latter period, the patient's general condition has remained relatively stable with regard to his maintenance of stable blood pressure, normal pulse, respirations, body temperature, his ability to eat and maintain a reasonably good state of nutrition. He has reported periodic exacerbations of pain in the right arm and in the right thigh stump, usually associated with visual evidence of activation of these lesions in terms of skin necrosis and drainage. These periods of reactivation of skin lesions have in general become of progressively shorter duration during the last six months and the net effect of all the various measures applied to the wounds has been a gradual healing to the point where he now has only a few small patches over the thigh stump which remain unhealed, similar areas over the right upper arm, and one small lesion in the skin of the scrotum which has been present only during the last six months and at present is showing evidence of healing. A variety of topical agents and ointments has been used without convincing evidence of prolonged benefit with one exception. Most of the healing which has taken place during the time the patient has been at this hospital has occurred while local treatments with Hydrogen Peroxide or Zinc Peroxide were being used. We have regarded this as suggestive evidence that anaerobic organisms are playing at least some role in the persistence of the lesions. Our efforts at culturing unusual disease causing organisms from the wound drainage have not been fruitful. A variety of bacteria have been cultured from time to time which have been of common types and studies for fungus have been consistently negative. More recently, we have been getting a Bacteroides funduliformis in the anaerobic cultures, but there have been other common organisms present at the same time. The more recent behavior of his wounds suggests to us that the continued application of peroxides may eventually be followed by complete healing, although the pitfalls associated with predicting the ultimate fate of ulcers in this man's skin are keenly appreciated by us.

This man's course in the hospital following the initial period of overall degeneration, followed by improvement, has been observed and evaluated by several medical consultants in special fields and certain recommendations and suggestions made are referred to in the record without later notations indicating the degree to which they were carried out or the reasons for their deferral. Some of these items I shall mention briefly.

X-ray films taken during the early months, while the patient was at this hospital were interpreted as being suggestive of osteomyelitis of the right femur. The features in question were not clearly distinguishable from osteoporotic changes in bones commonly seen at the site of amputation and the question of osteomyelitis was finally resolved when the draining wound disappeared in the vicinity of the end of the bone and this area became covered over with normal skin without evidence of persistent infection.

Because of the known association of pyoderma gangrenosum with ulcerative colitis, and because the patient has complained on infrequent occasions of pain in the abdomen, x-ray examinations of the intestinal tract have been obtained on repeated occasions and have yielded no evidence of disease. This patient has not complained recently of abdominal discomfort.

Fluctuations in hemoglobin and red cell count during a brief period about October, 1958 aroused questions concerning a source of chronic blood loss or hemolysis of cells. Subsequent studies including a Coombs' test and bone marrow examination failed to disclose abnormality and the patient's hemoglobin has since remained stable. We finally assumed that the transient anemia was related to infection.

Various tests for obscure diseases which might conceivably contribute to the problems seen in this patient have been carried out here with negative results. Among those tested for have been (1) Vitamin C deficiency, (2) porphyria, (3) urine content for elevated levels of serotonin metabolites, (4) Congo red test for amyloid disease.

Although additional biopsy material for study would be desirable and has been recommended by several examiners, its procurement has been invariably deferred on the basis of this man's well demonstrated propensity to develop spreading lesions after minimal injury.

The viewpoint that the most probable explanation for the chronicity of this patient's healing problems is the coexistence of infection plus an allergic type of tissue reaction has been the one most frequently expressed by consultants who have seen him at this hospital. This opinion has been shared by Dr. Robert Ebert, Chief of Medicine at Western Reserve University and Dr. O. W. Pinkley, our Dermatological Consultant along with other physicians of the Highland View Hospital staff. Dr. Pinkley has favored the diagnoses of Dermatitis Nodularis Necrotica or Von Wegener's Granulomatosis (diagnoses characterized by the above combination of features) and on this basis he recommended ACTH - then later a course of adrenosteroid therapy. We declined to follow this recommendation when we subsequently learned that adrenosteroid-like compounds were used without benefit at Cleveland Clinic during the previous year. On the basis that certain lesions associated with hypersensitivity states (Schwartzmann type reaction) were modified favorably by Heparin, Dr. Ebert recommended a trial on Heparin which was instituted during March, 1959 after it was found that the patient had elevated fibrinogen levels which may occur in that type of condition. No measurable therapeutic response occurred however, and the drug was discontinued after one month. His course since that time has been relatively stable with some slow improvement of wounds.

J. W. Benson

J. W. Benson, M.D.
Chief of Surgery

6-8-59

NAME Gallick, James ADMISSION No. 10,104 DIVISION LC HR

PROGRESS NOTES

Form 4-300

[fol. 1105p]

CASHIER'S OFFICE

MARYMOUNT HOSPITAL
12300 McCRACKEN BLVD
GARFIELD HEIGHTS 25, OHIO

DATE June [illegible]

Mr. James Gallick
4403 Dawshire Ave.
Parma, Ohio

For Hospital Services — Bal. Due

Sept. 18, 1954 to [illegible], 1954 — $2,220.[illegible]

Jan. 4, 1955 to March [illegible], 1956 — 9,626.[illegible]

Total amount due — 11,[illegible]46.[illegible]

SISTERS OF ST. JOSEPH (T.O.S.F.)
THANK YOU

CASHIER'S OFFICE

LAKeview 1-0500

MARYMOUNT HOSPITAL
12300 McCRACKEN BLVD
GARFIELD HEIGHTS 25, OHIO

DATE June 4, 1959

Mr. James Gallick
4403 Dawshire Ave.
Parma, Ohio

Adm. Jan.4,1955 Disch. March 1,1956

For Hospital Services		Bal. Due
Room and Board		
429 days at 16.50	7,078.50	
Blood	425.00	
Lab	223.00	
Operating Room	20.00	
X-rays	35.00	
Drugs, dressings	1,844.75	
		$9,626.25

[Vol. 1106a]

ep

SISTERS OF ST. JOSEPH (T.O.S.F.)
THANK YOU

a

CASHIER'S OFFICE

LUdlow 1-0500

MARYMOUNT HOSPITAL
12300 McCRACKEN BLVD
GARFIELD HEIGHTS 25 OHIO

DATE June 4, 1959

Mr. James Gallick
4403 Dawshire Ave.
Parma, Ohio

Adm. September 18, 1954 Disch. Dec. 6, 1954

For Hospital Services		Bal. Due
Room and Board 81 days at 18.00	1,458.00	
Operating Room	110.00	
Lab	82.00	
EKG	10.00	
X-rays	42.50	
Drugs, dressings, I.V's	517.75	
		2,220.20

SISTERS OF ST. JOSEPH (T.O.S.F.)
THANK YOU

F 113.2

CLEVELAND CLINIC
2020 EAST 93RD STREET
CLEVELAND, OHIO

Mr. James J. Gallick,
4403 Downshire Dr.,
Parma, Ohio.

FOR SERVICES RENDERED

782-829

TO AVOID ERROR RETURN THIS STUB WITH YOUR REMITTANCE.

DATE	SERVICE	DOCTOR	DEBIT	CREDIT	PAY LAST AMOUNT IN THIS COLUMN
1956	BALANCE RENDERED				
July 27	Exam	Netherton	25.00		
30	Special Dressing		15.00		
	Prof. Serv	Green	10.00		
	Diabetic Care	Tretbar	18.00		
Aug. 13	Debridement Ulcer of Leg	Anderson	300.00		
16	Change Dressing		n/c		
20	" "		n/c		
23-27-29-31-Sept. 4-6-10-13-17 26	Change Dressing		n/c		
Nov. 11	Graft Leg Ulcer	Anderson	300.00		
29	Debridement Leg Ulcer	"	300.00		
Dec. 13	" " " " "		300.00		
1957					
Feb. 5	Sternal Marrow	Hewlett	10.00		
Mar. 27	Debridement Leg Ulcer	Anderson	300.00		
Apr. 25	Prof. Serv	Williams	15.00		
May 21	Lt. High Thigh Amputation	Humphries	150.00		
1958					
June 27 to July 21, 1958	prof care in hosp	Curtis	75.00		
	Blood Volume Determination		15.00		
	Xray Therapy Trts (5)	Hays	50.00		
	Prof. Serv	P. Nelson	15.00		
	Consult	Harrison	10.00		
	Prof. Serv.	Vanordstrand Biddleston	25.00	FWD	1,933.00

MAKE CHECKS PAYABLE TO CLEVELAND CLINIC

PLAINTIFF'S EXHIBIT 21

F 113N

CLEVELAND CLINIC
2020 EAST 93RD STREET
CLEVELAND, OHIO

2

Mr. James J. Gallick

FOR SERVICES RENDERED 782-829

TO AVOID ERROR RETURN THIS STUB WITH YOUR REMITTANCE.

DATE	SERVICE	DOCTOR	DEBIT	CREDIT	PAY LAST AMOUNT IN THIS COLUMN
	BALANCE RENDERED				1,933.00
1957					
July 15	Debridement Ulcer Rt. Thigh & Graft	Anderson	1,500.00		
Sept 3	" " " "		n/c		
" 20	S-T Graft Leg Ulcer	"	n/c		
Oct.18	Debridement Amputation Stump Ltl Leg & closure	Secondary Anderson	n/c		
Nov.21	Debridement Ulcer Rt.Leg	"	n/c		
1958					
Apr.8	" " " "		n/c		
June 12	Amputation above Knee Rt.Leg	Humphries	150.00		3,583.00

MAKE CHECKS PAYABLE TO CLEVELAND CLINIC

MAKE CHECKS PAYABLE TO CLEVELAND CLINIC

FORM 135

CLEVELAND CLINIC HOSPITAL

2050 EAST NINETY-THIRD STREET
CLEVELAND 6, OHIO

Mr. James J. Gallick

~~4403 Dawnshire Drive.,~~

Parma, Ohio.

ROOM RATE, INCLUDING — Room, Dietary Service, General Nursing Service, Ordinary Drugs and Dressings — 782-829

			Amount
Room	177 days @	18.50	3274 50
Room	212 days @	19.50	4134 00
Operating Room	6 times		173 50
Anesthesia	6 times		250 00
Blood			350 00
Transfusion Service			52 50
Pharmacy & Tax			1083 83
Lab teste			230 00
Pabh Lab			24 00
Phys. Med Trts			57 50
~~Over~~ Xrays			30 00
Dressings & Supplies			5 00
Telephone & Telegrams			
TOTAL CHARGES from 6/27/57		7/21/58	9664 83

Credits Date	Memo	Amount
	Blood Returned	100 00
TOTAL CREDITS		100 00
BALANCE AS OF		9564 83

Please make all checks payable
TO CLEVELAND CLINIC HOSPITAL

This statement covers charges of the Cleveland Clinic Hospital only and does not include charges for surgeon's fees and services of the Cleveland Clinic

[fol. 1107b]

FORM 21

CLEVELAND CLINIC HOSPITAL

2050 EAST NINETY-THIRD STREET
CLEVELAND 6, OHIO

Mr. James J. Gallick

4403 Dawnshire Dr,

Parma, Ohio

ROOM RATE, INCLUDING — Room, Dietary Service, General Nursing Service, Ordinary Drugs and Dressings — 782-829

		Amount
Room	144 days @ 20.00	2880 00
Room	days @	
Operating Room	18 times	287 50
Anesthesia	18 "	535 00
Blood		940 00
Transfusion Service		150.00
Pharmacy & Tax		405 93
Lab Tests		189 00
Path Lab		20 00
Oxygen		2 50
Dressings & Supplies		
Telephone & Telegrams		2 25
TOTAL CHARGES from 7/30/56 12/21/56		5412 18

Credits Date	Memo	Amount
	Blood replaced	890 00
	Dec. 20, 1956 paid by patient	600 00
TOTAL CREDITS		1490 00
BALANCE AS OF		3922 18

Please make all checks payable
TO CLEVELAND CLINIC HOSPITAL

This statement covers charges of the Cleveland Clinic Hospital only, and does not include charges for surgeons fees and services of the Cleveland Clinic

FORM 125

CLEVELAND CLINIC HOSPITAL

2020 EAST 93RD GETHSEMANE STREET
CLEVELAND 6, OHIO

Mr. James J. Gallick
4403 Dawnshire Dr
Parma, Ohio

782-829

ROOM RATE, INCLUDING — Room, Dietary Service, General Nursing Service, Ordinary Drugs and Dressings —

				Amount
Room	5	days @	18.50	92 50
Room	62	days @	21.50	1333 00
Operating Room				48 00
Anesthesia				70 00
Blood				
Transfusion Service				
Pharmacy & Tax				103 49
Lab				43 00
Xray chest				10 00
Path Lab				10 00
Oxygen				
Dressings & Supplies				
Telephone & Telegrams				

TOTAL CHARGES from 2/5/57 to 4/13/57 — 1,709 99

Credits Date	Memo	Amount

TOTAL CREDITS — none

BALANCE AS OF — 1,709 99

Please make all checks payable
TO CLEVELAND CLINIC HOSPITAL

This statement covers charges of the Cleveland Clinic Hospital only and does not include charges for surgeon's fees and services of the Cleveland Clinic

[fol. 1107-1]

CLEVELAND CLINIC HOSPITAL

CLEVELAND 6, OHIO

Mr. James J. Gallick

4403 Dawnshire Dr

Parma, Ohio.

782-829

ROOM RATE INCLUDING Room, Dietary Service, General Nursing Service, Ordinary Drugs and Dressings

			Amount
Room	58 days	18.50	1073.00
Room	days		
Operating Room			76.00
Anesthesia			60.00
Blood			100.00
Transfusion Service			15.00
Pharmacy & Tax			60.55
Lab			53.00
Oxygen			
Dressings & Supplies			5.00
Telephone & Telegrams			

TOTAL CHARGES from 4/23/57 to 6/22/57 1442.55

Credits Date	Memo	Amount
	Blood Credit	50.00

TOTAL CREDITS 50.00

BALANCE AS OF 1392.55

Please make all checks payable
TO CLEVELAND CLINIC HOSPITAL

This statement covers charges of the Cleveland Clinic Hospital only and does not include charges for surgeon's fees and services of the Cleveland Clinic

CLEVELAND CLINIC HOSPITAL

Mr. James J. Gallick

4403 Dawnshire Dr

Parma, Ohio

ROOM RATE, INCLUDING Room, Dietary Service, General Nursing Service, Ordinary Drugs and Dressings — 782-820

		Amount
Room	days	
Room	days	
Operating Room		
Anesthesia		
Blood		
Transfusion Service		
Pharmacy & Tax		4.12
Oxygen		
Dressings & Supplies		
Telephone & Telegrams		

TOTAL CHARGES from Feb. 2, 1957 — 4.12

Credits Date	Memo	Amount

TOTAL CREDITS — none

BALANCE AS OF — 4.12

Please make all checks payable
TO CLEVELAND CLINIC HOSPITAL

This statement covers charges of the Cleveland Clinic Hospital only and does not include charges for surgeon's fees and services of the Cleveland Clinic

[fol. 1107f]

[fol. 1108]

PLAINTIFF'S EXHIBIT 22

STATEMENT

HIGHLAND VIEW HOSPITAL

3901 IRELAND DRIVE
CLEVELAND 22, OHIO

June 5, 1959

Mr. James Gallick
4403 Dawnshire Drive
Parma, Ohio

FOR (Patient) GALLICK, JAMES

PLEASE RETURN THIS STUB WITH YOUR CHECK

DESCRIPTION	DATE	CHARGES	CREDITS	BALANCE
Admitted 7-21-58				
July 11 days @ $ 17.00/da.	July '58	187.00		
Initial Blood	Aug. '58	25.00		
August 31 days @ $ 17.00/da.	Aug. '58	527.00		
Blood	Sept. '58	25.00		
September 30 days @ $ 20.00/da.	Sept. '58	600.00		
October 31 days @ $ 20.00/da.	Oct. '58	620.00		
Blood	Oct. '58	25.00		
Blood (2)	Oct. '58	50.00		
November 30 days @ $ 20.00/da.	Nov. '58	600.00		
December 31 days @ $ 20.00/da.	Dec. '58	620.00		
5 Pts. of Blood replaced	Dec. '58		125.00	
1959				
January 31 days @ $ 20.00/da.	Jan. '59	620.00		
February 28 days @ $ 20.00/da.	Feb. '59	560.00		
March 31 days @ $ 20.00/da.	Mar. '59	620.00		
April 30 days @ $ 20.00/da.	Apr. '59	600.00		
May 31 days @ $ 20.00/da.	May '59	620.00		$ 6,174.00

THE REYNOLDS & REYNOLDS CO., DAYTON 1, OHIO

HIGHLAND VIEW HOSPITAL
CLEVELAND 22, OHIO

Form A-23

MY NAME IS WILLIAM CLASON
I LIVE AT 10918 St. MARK AVE.
I HAVE BEEN LIVING AT THIS
ADDRESS FOR THE PAST 12 YRS.
MY PHONE NUMBER IS CL 1-3397
I AM EMPLOYED AS A BRAKEMAN
FOR THE B+O RAILROAD FOR THE
PAST 11½ YEARS.

JAMES GALLICK AND I WORKED
TOGETHER OFF AND ON FOR
ABOUT TEN YEARS. BACK IN
AUGUST, THE EARLY PART, OF 1954
WE WERE WORKING WHAT IS
CALLED THE DOWNTOWN AREA.
IT WAS ABOUT THIS PERIOD OF
TIME THAT HE BID IN FOR A
WEST END JOB. AFTER HE WAS
GONE FOR ABOUT TWO WEEKS A
CLAIM AGENT FOR THE RAILROAD
CAME OVER AND SAID HE WANTED
A STATEMENT FROM ME IN RELATION
TO JAMES GALLICK AS HE HAD
BEEN BITTEN BY AN INSECT
WHILE HE WAS WORKING THE
DOWNTOWN AREA. OUR JOBS WOULD
TAKE US FROM THE NICKEL PLATE
JUNCTION TO WHISKEY ISLAND
DURING THE COURSE OF A DAYS
WORK. A PART OF EACH DAYS WORK
TOOK PLACE BY LIME RD. NEAR
THE COLUMBUS ROAD BRIDGE. NOW

William Clason

[fol. 1109].

PLAINTIFF'S EXHIBIT 23-A, 23-B, 23-C

William Olson

WE ALWAYS WORKED PART OF OUR DAY HERE. THERE IS A TRACK OF THE B&O RAILROAD WHICH GOES UNDERNEATH THE COLUMBUS RD BRIDGE AND IT IS IN A DEPRESSED & LOWER AREA. AS A RESULT THERE IS A SWAMP THERE. THERE MUST ALWAYS BE ABOUT A FOOT OF WATER OR MORE THERE IN EVEN GOOD WEATHER AND DURING THE RAINY WEATHER IT IS MUCH WORSE. THERE IS NOT ENOUGH DRAINAGE THERE OR ELSE ITS CLOGGED UP. NOW -- PAUL DeLOOA THE SECTION FOREMAN HAS MADE SEVERAL ATTEMPTS TO CLEAR THIS SWAMP UP BUT IT WAS NEVER SUCCESSFUL ALTHOUGH IF THEY PUT IN A DRAINAGE DITCH DEEP ENOUGH THEY COULD RUN IT TO THE RIVER WHICH IS ONLY ABOUT 250 FEET AWAY AS A RESULT OF THIS CONDITION THERE ARE QUITE A BIT OF BUGS, RATS, INSECTS AND DEAD ROTTING PIGEONS THERE. THE CONDITION WAS BAD SEVERAL YEARS AGO AND IS STILL BAD. I IMAGINE THAT IF JAMES GILLICK WAS BITTEN BY A INSECT IT

COULD HAVE COME FROM THIS
AREA I DON'T KNOW WHERE
OR HOW. JAMES GALLICK WAS
BITTEN. I GAVE THIS INFORMATION
IN A SIGNED STATEMENT TO
THE CLAIM AGENT FOR THE
RAILROAD.

I have read this and it is true
William Shaw

My name is Joseph J. Corrigan
I live at 1516 Rock Maury Ave.
My phone number is [illegible]
I am married + have five
children. I am employed for almost
the past 11½ years as a trackman
for the B + O Railroad. Back in
August of 1954 I heard that
James Hallock, a fellow worker
with me was bitten by a
insect [illegible] with him
the day that he was bitten
although we have worked together
for periods of up to six months
at a time. After James Hallock
was injured I never had the
occasion to see him again
I heard later on that he was
in bad shape and was unable
to do any work.
I have heard several reports
of how he was injured. One
of these seemed to be that he
was bitten by an insect at the
B + O yard at W Bird street
and Greenley St. and another
place at a ditch which lies
along the B + O right of way
between Columbus Rd Bridge
and the Carter St Bridge; At a
point between these two Bridges that

tracks are in a low spot and as a result water and sewage gathers here. I have been here, employed by the railroad and that sewage and water has been there for at least fifteen years. There has been dead birds and pigeons there also and perhaps the insects have come from that. The only thing the railroad would have to do to get rid of this pool of water and sewage and other dead animals and birds would be to put in a sewage system. There may be a sewage system there but it may be clogged up.

Joseph F Casey

[fol. 1110a]

Jan. 9, 1950

Gallick J.I.
1629 E. 86 St.

Patient of Dr. Heller -

Dia. to back - Will return Tues. P.M.

DEFENDANT'S EXHIBIT A

[fol. 1111]

(Front)

12-4-50

GALLICK - JAMES

1471 CRAWFORD CA. QP

12/1/50 Jumping off of locomotive
" Hurt his thigh
OE. B & C Achilles. Rupture muscle fibers. Instructed Remarkage.
IH Heat. Support. Instruction

(Back)

12-4-50	OC		Pd
12-8	OC		Pd
12-12	OC	~~Ext~~	3 -
	X Ray		10 -

Ret work 12/9 - performance
12-14 had to quit
12-16
12-18 OC
12-20 OC
12-27 OC
1-2-51 OC

~~N 1951 OC~~
1951 OC
" 6, 8, 10 dia.
1-15 "
1-22 "

1-25 OC
1-27 OC
1-29
2-3 OC

DEFENDANT'S EXHIBIT B

605

(Front)

DEFENDANT'S EXHIBIT C

GARRICK. MRS JOHN.

1471 CRAWFORD Rd (N) J'.

Pain in chest & lower back.

PC xRay req Pneumonia
Very oppressive

AC Cl Lobar pul - req Rest in.

(Back)

3.10.51 AC
xRay

10 -

pd 13 -

(Front)

DEFENDANT'S EXHIBIT E

GALLICK - J. E 1-31-53
4403 DAWNSHIRE DR. (P) P suppl. list E
PARMA, (D).

Bgs 152/88

04 Bf x Bt2

(Back)

5-X

CK returned 10

APR 1 1953 S

1. X 4

(Front)

GALBICK JOHN

Inf R leg sept 2nd F

RH viral syndr and dem Pen

IIIIF

(Back)

8 no ref 6 x

8 ref ac Red Pen 6 /

9-2 ac Red: no Pen 3 -

9-7 ac Red. DNS 6 -

IIIIF

C

1

DEFENDANT'S EXHIBIT F

[fol. 1112]

DEFENDANT'S EXHIBIT G-1

Deft Ex. G-1

Illin. 3-10-51. THE BALTIMORE AND OHIO RAILROAD COMPANY Form 703 B—Rev.

TIME RETURN AND DELAY REPORT OF YARD TRAIN EMPLOYEES

AKRON 9 AUG 10 1954

No. Division Engineer Date

Length of Time off Duty Prior to This Trip	FIRST WENT ON DUTY Place	Date	Time	FINALLY WENT OFF DUTY Place	Date	Time	Total Time on Duty Hrs.	Min.	IDENTIFICATION NO. & NAME	Occupation
16	Cleveland, O	AUG 10 1954	2:30	Cleveland, O.	8/10	11:P	8		- 48654 James J Gallick	Fireman
									[redacted]	Ydmn
									44175 WILLIAM L. CLASON	Helper
									57890 WILLIAM MOLNAR	Helper
8									66412 CHARLES R. VALEK	Helper

REMARKS: Allow 95¢ Coupling Air Hoses Lower ya - 8.

FOR TIMEKEEPER'S USE ONLY

AUDIT 64726

Occ. Code No.	Straight Time Actually Worked	Hours Paid	Overtime Hours	Cont. Allow. Amount	Cont. Allow. Code	Rate Code
3						
4						
4						
4						

RUN NUMBER | TRIPS

DETAILS OF SERVICE

RUN NUMBER	ENGINE	DEPARTURE Station	Time Called for	Time went on Duty	Time Train Departed	ARRIVAL Station	Time Train Arrived	Time went off Duty	Kind of Service Yard Work, Work, Etc.
2	810	Cleveland, O	2:30	2:P	3:P	Cleveland, O.	11:P	11:P	Yard

APPROVED FOR OVERTIME, NOT MORE THAN [illegible]

for P Gordon

TIME CLAIMED

STRAIGHT TIME 8 hrs OVER TIME —

OTHER TIME —

I HAVE READ AND HEREWITH SIGN FOR ALL GENERAL ORDERS UP TO AND INCLUDING

Akr. DIV. G. O. NO. 15

DIV. G. O. NO.

DIV. G. O. NO.

I CERTIFY THIS REPORT TO BE CORRECT:

Signature James Gallick Occupation Fireman

Correct as to time went on duty Correct as to time finally went off duty

E Robinson Ctl mus

[fol. 1112a

DEFENDANT'S EXHIBIT 622

Def'l Exh. Y-2

THE BALTIMORE AND OHIO RAILROAD COMPANY

TIME RETURN AND DELAY REPORT OF YARD TRAIN EMPLOYEES

AUG 12 1954

No. ... Division AKRON ... Engineer ... Date ...

Length of Time of Each Duty & This Trip	FIRST WENT ON DUTY: Place	Date	Time	FINALLY WENT OFF DUTY: Place	Date	Time	Total Time on Duty: Hrs.	Min.	IDENTIFICATION NO. & NAME	Occupation
16	Cleveland, O	AUG 12 1954	3P	Cleveland, O	8/12	11-P	8	-	48654 JAMES J. GALLICK	Fireman
									44175 WILLIAM I. CLASON	Helper
									57890 WILLIAM MOLNAR	Helper
									64778 CLOYD W. STINE	Helper

REMARKS: Allow gas Coupling Air Hoses Lower yard

Occupation	Code No.	Straight Time Actually Worked	Regular Paid	Overtime Hours	Constr. Allow. Amount	Constr. Allow. Code	Rate Code
Fireman	3	8					
Helper	4						
Helper	4						
Helper	4						

FOR TIMEKEEPER'S USE ONLY

AUDIT 64922

RUN NUMBER	TRIPS

DETAILS OF SERVICE

RUN NUMBER	ENGINE	DEPARTURE: Station	Time Called for	Time went on Duty	Time Train Departed	ARRIVAL: Station	Time Train Arrived	Time went off Duty	Kind of Service (Yard Work, Wreck, Etc.)
2	521	Cleveland, O.	3P	3-P	3-P	Cleveland, O.	11-P	11-P	Yard

APPROVED FOR OVERTIME AND BOOK

TIME CLAIMED

STRAIGHT TIME 8 hrs + OVER-TIME —

OTHER TIME —

I HAVE READ AND HEREWITH SIGN FOR ALL GENERAL ORDERS UP TO AND INCLUDING

AKr DEV. G. O. NO. 15

DEV. G. O. NO.

DEV. G. O. NO.

I CERTIFY THIS REPORT TO BE CORRECT:

Jamie Gallick Conductor Foreman

Check up to time off duty Checked up to time back on duty

[illegible] [illegible]

1005I 9-24-52 Form 790

THE BALTIMORE AND OHIO RAILROAD COMPANY

REPORT OF PERSONAL INJURY

Report No. 20 — October 20 (Date of Report) 19 54 — Akron Division

G PCC WRG ICW AJS DAW HGC LWB HJS

Location Cleveland (Nearest Station) State Ohio Date August 10, 19 54 Time Began work 3:00 PM Injured 4:00 PM

Train Yd. Engine 510 Loads 0 Empties 0 Adj. Tons 0 Speed - Weather Clear

Number of cars with air brakes in working order - Was bell rung - Was whistle sounded -

Engineer P.English — Porter

Fireman N.S.Briggs — Brakeman W.I.Clason

Conductor J.J.Calliek — Brakeman Wm Molnar HE 1-0852

Baggage Master — Brakeman C.R.Valek

Person Injured James J.Calliek — Age 53 — Single, married, widowed or divorced Married

Residence 11403 Dunsmire Dr. — Nationality American — Race White — *RD Cert. No.

Speak English Yes — *Number children under 18 years 0 — *Member of Relief Dept. Yes

Occupation Yd. Foreman — *Length of experience 10½ Yr. — Piece or time worker time

*Working— Days per week 5 — Hours per day 8

Nature and extent of injury Insect bite back of left leg at knee joint

Cause Not known

If accident due to a defect describe fully

Was a safety rule violated No

Who will investigate this accident C.R.Gordon, TTM

What action will be taken to prevent a similar accident

What was done with injured person and by whose orders Continued working until September 12th under care of family physician and hospitalised September 18th on orders of family physician due to infection setting in.

What does injured person say

Was person deaf, blind, intoxicated, insane, asleep or negligent No

Estimated duration of disability Not known

WITNESSES:	Name	Occupation	Office Address
	None		

BALTIMORE & OHIO R.R. OCT 22 1954 CLAIM AGENT-AKRON, O.

Remarks: Walking along Line Road to West Street Team Track under Columbus Road Bridge when I was bitten by insect inside pant leg.

Disregard questions marked (*) when reporting injury to persons other than employes.

In case of injury to employes report should be rendered by their immediate superior. If he has no personal knowledge of the accident he should so state on report, giving, however, all the facts he has been able to develop.

Correct: James J.Calliek

Yd. Foreman (TITLE)

(TITLE) (21)

Rev. 6-11-48 Form 1062-B-Rev. Wolfe Exh I-1

The Baltimore and Ohio Railroad Company

Accident to James J. Ballick at Cleveland, Ohio Date 8-10-54

Statement of James J. Ballick Married / Single Occupation Brakeman & Conductor

Age 53 Years. Residence 4463 Devonshire Drive, Parma 29 Ohio

Made to Wm H. Robinson on the 2nd day of November 1954

At Management Hospital, Garfield Hts. Ohio

In the presence of I have been in B&O Service since 1944 On August 10, 1954 I was working my regular job, Cleveland Yard Job No 2, 2nd Trick, as Yard Foreman. The weather was hot, clear and dry. Any anyone was in the No 2 track of the Spur Yard when it had shoved some cars and was coming out Light, and I had given the Engineer instructions to go to the River track and become clear. That the engine was coming ahead I walked from the track over to the West West Team track to check the cars. I was walking on the left side of the Tracks going west and was directly between the Columbus Road Bridge when suddenly I felt something sting or bite my left leg just about 4 inches above my knee on the left side of my leg next to the instep. I was wearing khaki trousers and when I felt the bite or sting I stuck at it and could feel what felt like a large bug or insect I could not see it as it was inside my Trouser leg, but I could get hold of it through my trousers with my fingers and squeezed it and I heard and felt it pop under the pressure. After the occurrence I could still feel the effect of it and it felt like an insect bite. I reported to my Foreman my injury shortly after that, that I had gotten a bite. I was treated with my work and after I

(Over)

WITNESS: William O'Meara X James J. Ballick

1114

DEFT EX A 4-25-57 RH

[fol. 1114]

DEFENDANT'S EXHIBIT I-1, I-2

Def's Exh 2

Log. 11148

11144

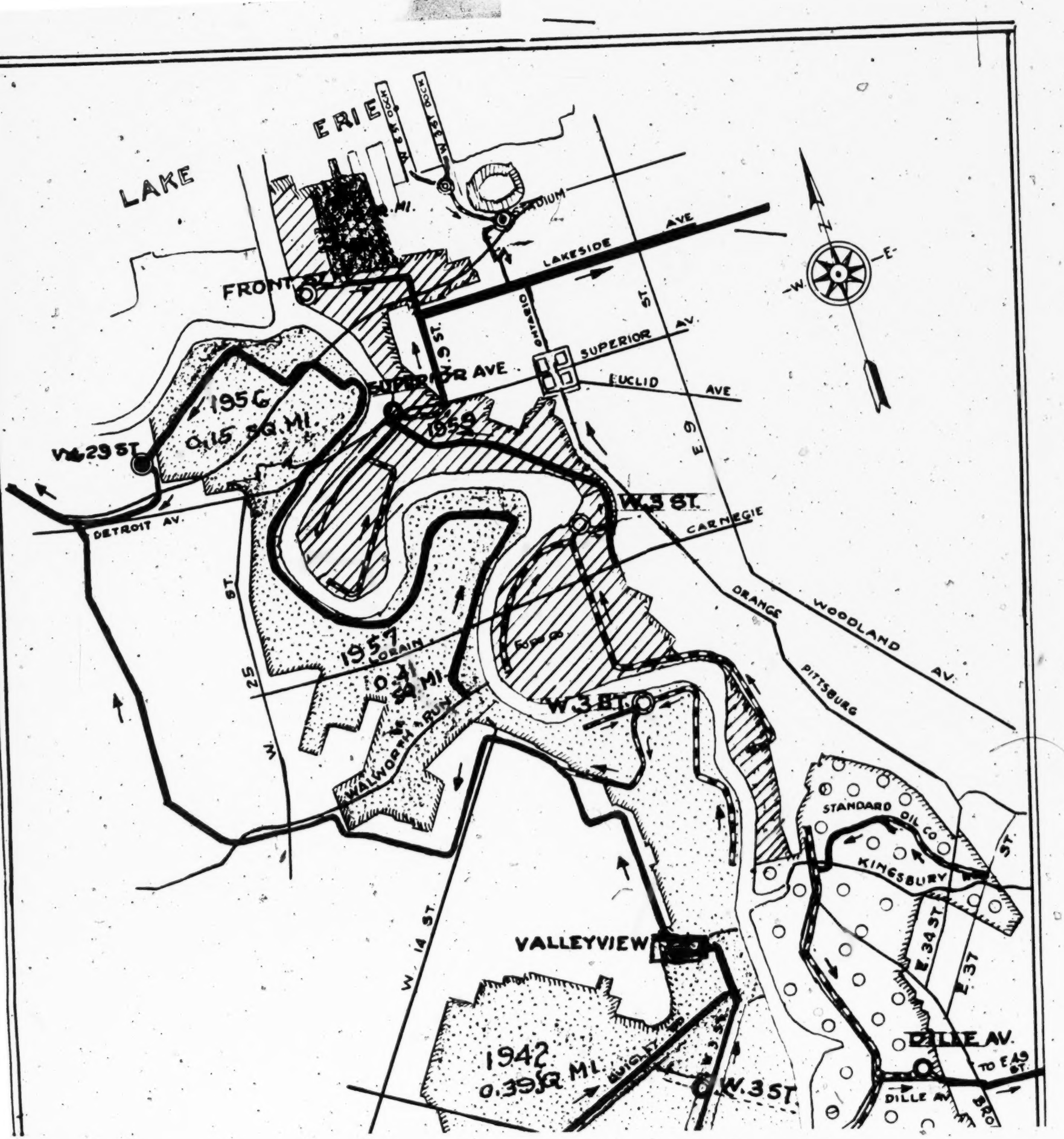
get home I told My Wife about it. All that time it appeared to look like a mosquito bite with a small spot white in color in the middle but soon swelling commenced at it had more than often symptoms, and had to open in three or four places and then take a long time in a normal state of my return & prior to that I had had but two days except that at fall time a big about 3 days late. My wife told me that the bite was getting like a bad bite I had a doctor dressed it & the sore began to open and I noticed at that time I got home to the 1st day I saw Dr Hallett he told me I took the wrong step in taking upon the advice of Dr Hall & left Dr Hallett & went to Dr Hall & called Dept 11. By that time the sore began to close & continued to heal up to about 1 week after I saw Dr Hall. All the time I got the bill was working, may be good but the last time I went back to the office of the Dr. The girl there told the people behind to the back as that was my turn & then called me & left me alone with Dr Hall & then I saw Dr Hall & he told me that I had to pay the bill & that was all. I think that Dr Hall was rather hard to deal with & I have had a lot of trouble. From time to time I have noticed that I am frequently troubled on hand & arm & ankles, & all week in the beginning of June last & the last week I can with reference to the cause of my trouble that I have obtained about above.

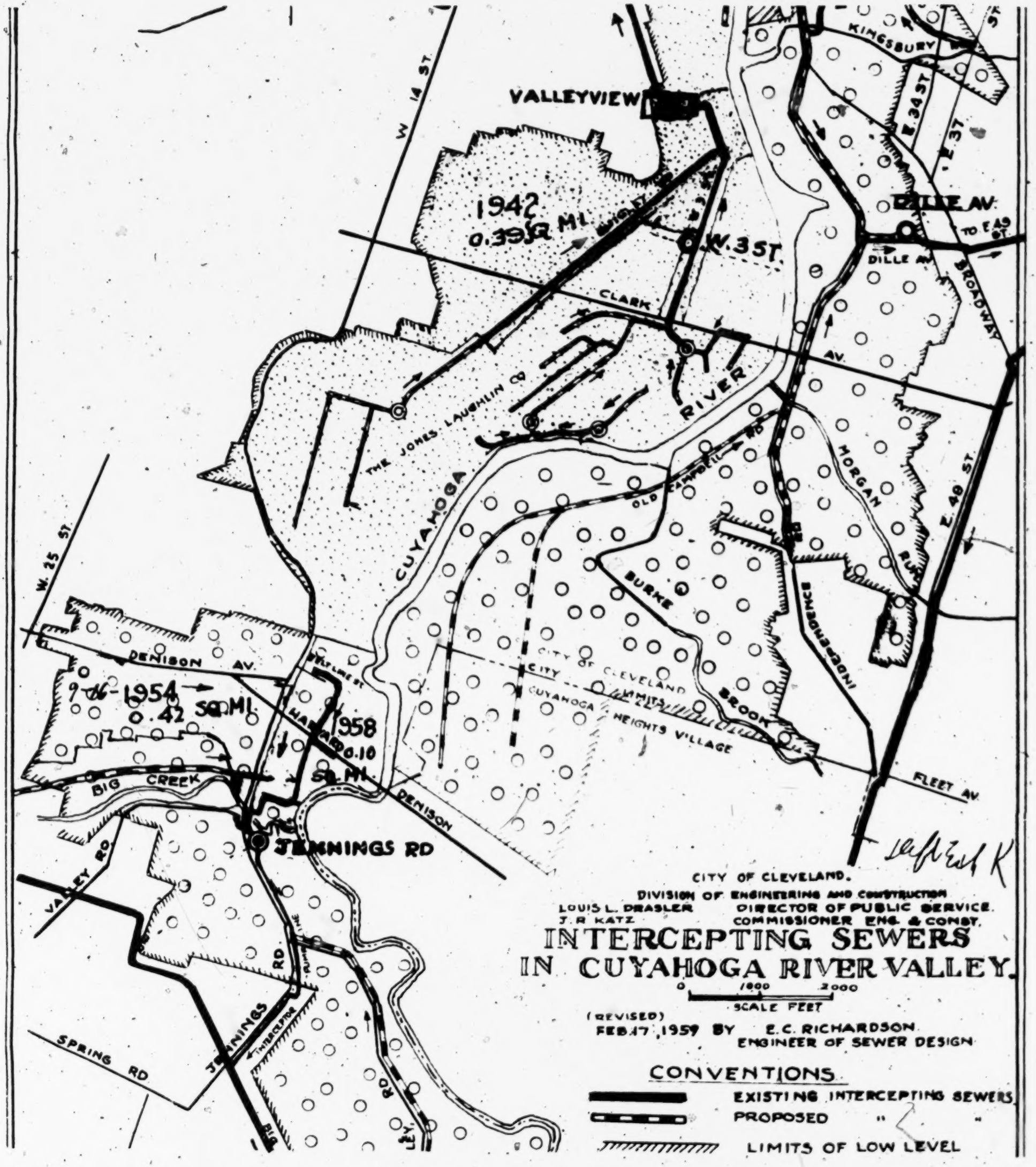
Have You read your foregoing statement or had same read to You

NOTE—Have witness give names of all other persons he knows of that were witnesses to the accident. Have witness sign statement which should be attested by the person taking same.

& is it correct to the best of your knowledge?

WITNESS William H Kemp X


LAKE ERIE
W. 9TH DOCK
W. 3RD DOCK
STADIUM
LAKESIDE AVE
FRONT
OHIO ST.
E. 9 ST.
SUPERIOR AV
SUPERIOR AVE
EUCLID AVE
1956
0.15 SQ. MI.
1959
W. 29 ST.
DETROIT AV.
W. 9 ST.
CARNEGIE
ORANGE
WOODLAND AV.
PITTSBURG
1957
LORAIN
0.31 SQ MI
W. 3 ST.
WALWORTH RUN
W. 25 ST.
W. 14 ST.
STANDARD OIL CO
KINGSBURY
E. 34 ST.
E. 37 ST.
VALLEYVIEW
1942
0.39 SQ MI
W. 3 ST.
DILLE AV.
DILLE AV.
TO E. 49 ST.
N
S
E
W



CITY OF CLEVELAND.
DIVISION OF ENGINEERING AND CONSTRUCTION
LOUIS L. DRASLER — DIRECTOR OF PUBLIC SERVICE.
J. R. KATZ — COMMISSIONER ENG. & CONST.

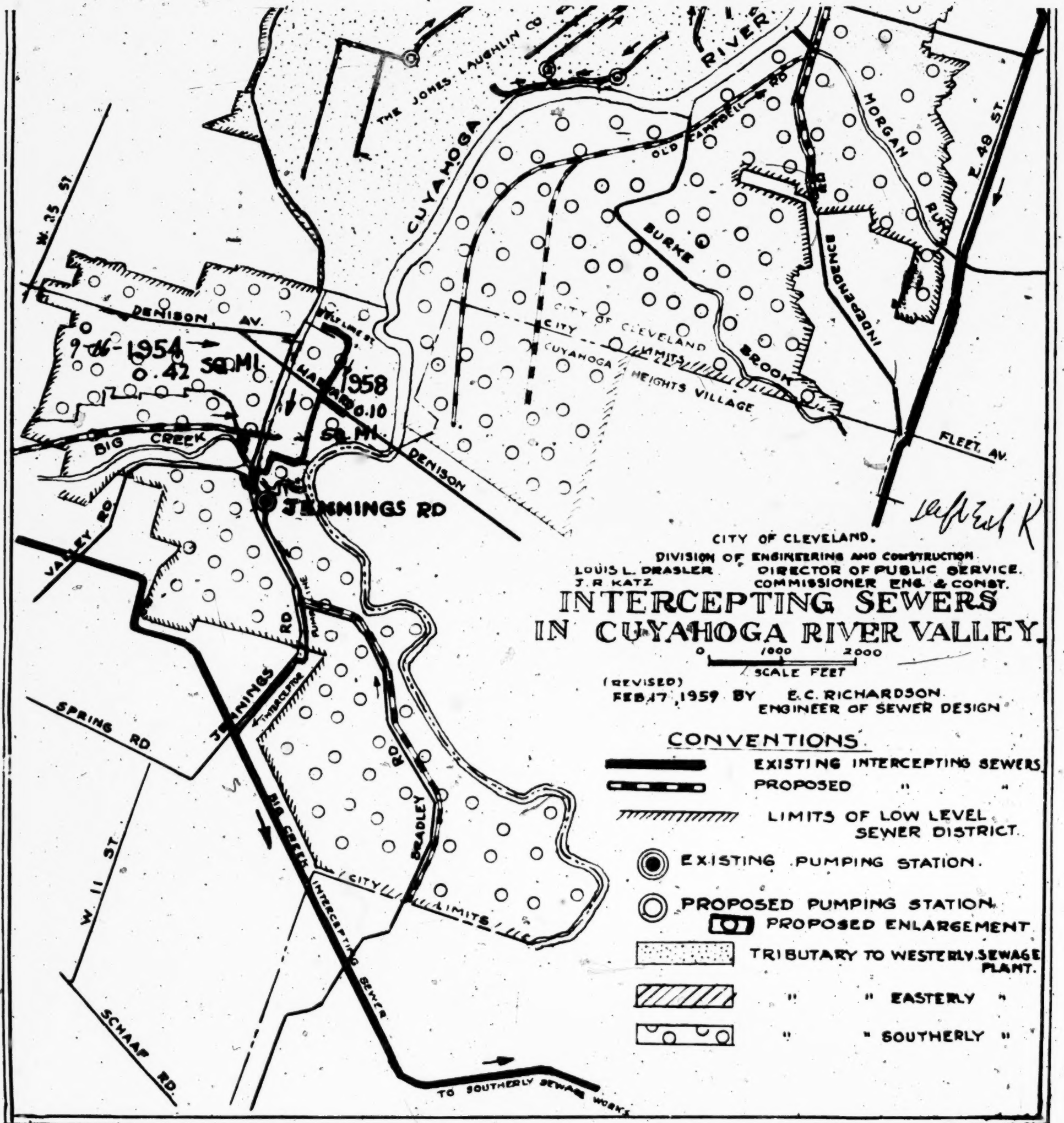
INTERCEPTING SEWERS IN CUYAHOGA RIVER VALLEY.

0 1000 2000
SCALE FEET

(REVISED)
FEB. 17, 1959 BY E. C. RICHARDSON
ENGINEER OF SEWER DESIGN

CONVENTIONS

EXISTING INTERCEPTING SEWERS
PROPOSED " "
LIMITS OF LOW LEVEL



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INTERCEPTING SEWERS IN CUYAHOGA RIVER VALLEY.

0 1000 2000
SCALE FEET

(REVISED)
FEB. 17, 1959 BY E. C. RICHARDSON.
ENGINEER OF SEWER DESIGN

CONVENTIONS

- EXISTING INTERCEPTING SEWERS
- PROPOSED " "
- LIMITS OF LOW LEVEL SEWER DISTRICT.
- EXISTING PUMPING STATION.
- PROPOSED PUMPING STATION.
- PROPOSED ENLARGEMENT.
- TRIBUTARY TO WESTERLY SEWAGE PLANT.
- " " EASTERLY "
- " " SOUTHERLY "

MAP No. 8

[fol. 1116]

DEFENDANT'S EXHIBIT N

(See opposite) ☞

CLEVELAND OHIO

31+71 Channel Line
31+78.8 ℄ End Rest Bearing

SUPERIOR VIADUCT

COLUMBUS ROAD

CANAL

JAMES ST.

WEST 5TH ST.

LIME ST.

5°00'
17°00'
B. No 462N

BR. No 462M

BR. No 462

13°00'
05'32"

(4308)

(4307)

T-VIAA(W) L=59'-2"

T-VIAA(E) L=500'-2"

T-VIAA(S) L=719'-0"

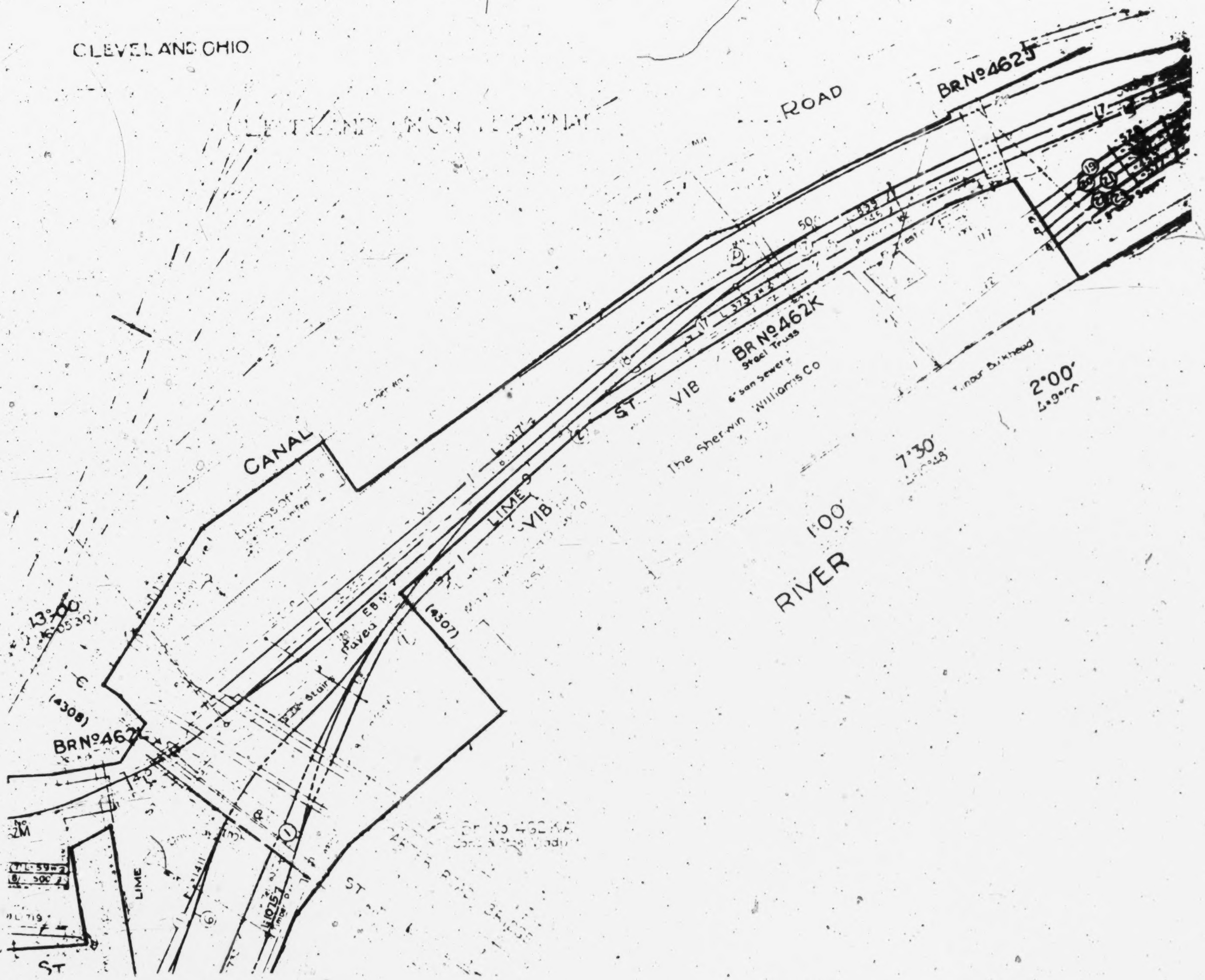
EB Paved Stairs

LIME

VIB

ST

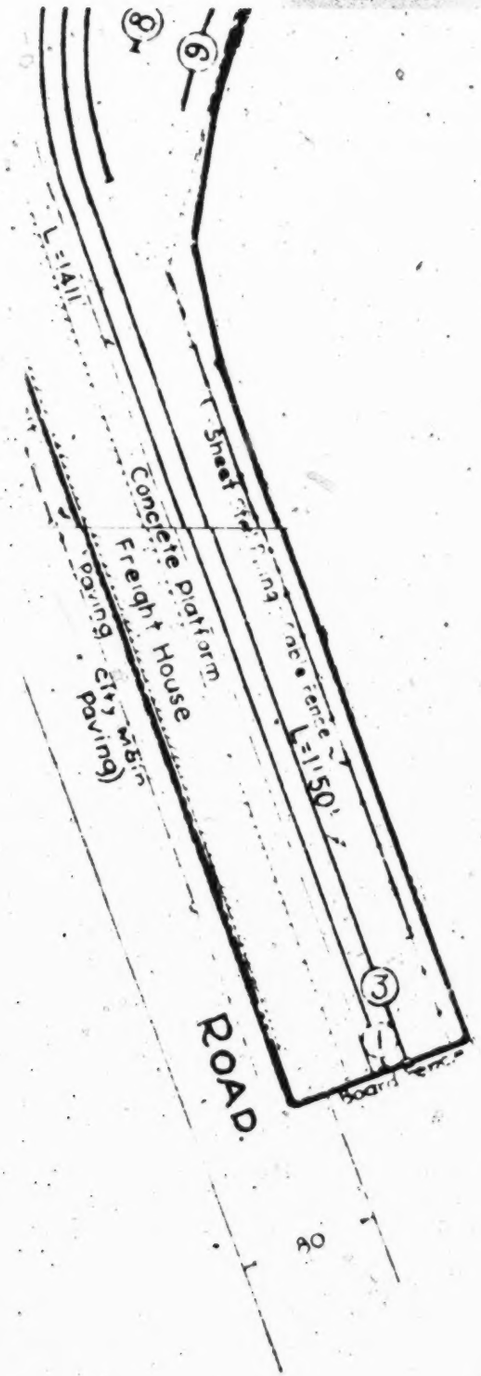
CLEVELAND OHIO



WEST
ST.
Br. No 462 M.L.
6°00'
COLUMBUS RD.
LIME
CUYAHOGA
DETROIT
MERWIN
ST.
CENTER
FALL ST.
COLUMBUS
ST.
WINTER
COLUMBUS FREIGHT YARD
Concrete Platform
Frame House
Existing City Paving
ROAD

THE BA

AK



Default N

STATION MAP - TRACK

THE BALTIMORE AND OHIO RAILROAD COMPANY

OPERATED BY

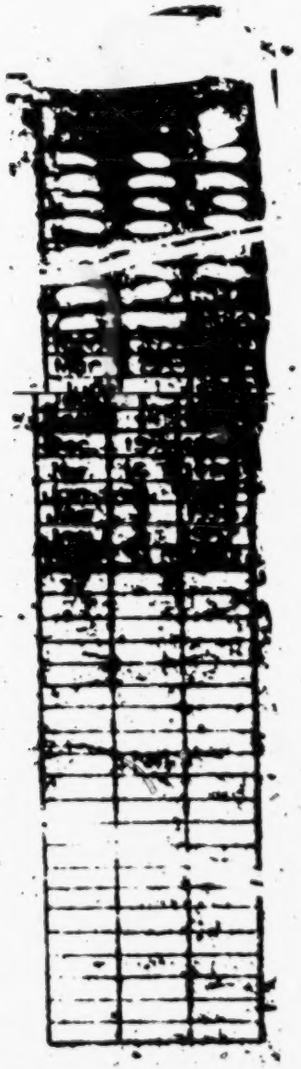
THE BALTIMORE AND OHIO RAILROAD COMPANY

AKRON DIVISION — C. T & V. BRANCH

STATION — TO STATION

SCALE: 1 IN [illegible] FT — JUNE 30 [illegible]

OFFICE OF VALUATION ENGINEER
BALTIMORE, MD.



PHENSIANT'S

[fol. 1117]

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT

State of Ohio, Cuyahoga County, ss.

No. 23,087

JAMES GALLICK, Appellee,

v.

THE BALTIMORE AND OHIO RAILROAD CO., Appellant.

OPINION

Hunsicker, J.

James Gallick, an employee of Baltimore and Ohio Railroad Co., brought an action in the Common Pleas Court of Cuyahoga County, Ohio, under the Federal Employers' Liability Act, alleging that he suffered injury because he was not furnished, by his employer, a reasonably safe place to work, and was required to work under unhealthful and unsanitary conditions.

Mr. Gallick, along with other employees of the Baltimore and Ohio Railroad Co., was engaged, over a period of time, at a place known as the "230 Seneca Street job." The location of the work was in the "flats" section of Cleveland, Ohio, a highly industrialized area adjacent to the Cuyahoga River, a short distance south of the river's entrance into Lake Erie. Specifically, Mr. Gallick, the foreman of the railroad crew, along with others, spotted [fol. 1118] cars to be moved into the yards, or to industrial establishments. He was required, during the month of August, 1954, to walk along a B & O Railroad right of way, consisting of one line which ran along the river near the industrial plants serviced by such railroad.

This railroad line passed under several bridges, among which was the Columbus Street bridge. Under this bridge, on the east side of the railroad right of way, was a ditch,

which, for many years, contained stagnant water, both in the dry and wet seasons of the year. In and about this ditch were dead and decayed rats and pigeons. Insects were seen on, over and about this stagnant pool. The evidence shows that the condition of this pool was known to the employees of the railroad for a long time before the occurrence about which Mr. Gallick complains.

Mr. Gallick, on or about the 10th day of August, 1954, while walking along the west side of the railroad right of way, under and also near the Columbus Street bridge, stopped momentarily to see where the railroad engine was that would pick up some cars. He then took a step or two, at which time he felt a bite on his left leg, a few inches above his left knee. He put his hand on the place where he felt this bite, and grasped between his finger and thumb an object which he said felt like an insect, and which, when squeezed, cracked or popped. This object, or insect, was inside his left trouser leg. When he released the object it slipped out of his left trouser leg. Before he could locate it, the engine was nearby, and he boarded one of the cars. Mr. Gallick said the object was about as long as the width of three fingers, and as thick as his little finger. [fol. 1119] The size of the insect was thus indicated to be about two inches long by one-half inch wide.

Later that day, after his lunch period, about 7 o'clock p.m. (Mr. Gallick worked from 3 p.m. until 11 p.m.), he went to the washroom; and, because he felt some sensation on the back of his left leg, he washed the place where he had felt the bite. When he arrived home after work, he showed this place to his wife, who said it looked like a bite, and that it was pink on the top, and about the size of a fingernail. It grew redder and larger, and, since it did not heal, but broke open like a boil, Mr. Gallick went to a doctor, several days after the alleged bite, who administered penicillin and gave an ointment for dressing the by-now open lesion.

The wound did not respond to treatment, and another doctor was consulted. The condition grew progressively worse, until, after several years of hospital attention by many, many doctors, examinations, tests and treatments,

including the amputation of both legs, Mr. Gallick is permanently confined in a hospital suffering from many severe pus-forming lesions on his body. It was stated by one of the doctors who treated him that one arm may have to be amputated to relieve the effect of a lesion in the armpit. None of the doctors who have treated and studied his case can give the etiology of his condition.

One hospital and some of the doctors state the condition of Mr. Gallick to be "pyoderma-gangrenosa, secondary to insect bite."

The trial of Mr. Gallick's action against B. & O. Railroad Company proceeded upon two claimed grounds of [fol. 1120] negligence: first, "(4) In that it failed to provide plaintiff with a reasonably safe place in which to perform his work duties"; and, second "(6) In that it knew that, by permitting said pool of stagnant water to accumulate dead pigeons, rats, bugs and vermin, insects would be attracted to said area, and that its employees would have to work under unhealthful and unsanitary conditions."

Baltimore & Ohio Railroad Company, denying any negligence on its part, said that, if the condition of Mr. Gallick arose from an insect bite sustained by him while working upon railroad property, "the likelihood of harm and consequences" to Mr. Gallick from such bite "were beyond the realm of reasonable probability or foreseeability, with the result that no duty arose requiring the exercise of care by" the railroad "to protect" Mr. Gallick "from any such risk."

After a lengthy trial, and the submission of the case to a jury with a special verdict and numerous interrogatories, a judgment for $625,000 was entered by the Court of Common Pleas.

From this judgment an appeal on questions of law has been brought to this Court by Baltimore and Ohio Railroad Co., which set out sixteen assignments of error, as follows:

"1. The court erred in overruling defendant's demurrer to plaintiff's petition.

"2. The court erred in reducing the seated panel to 10 jurors by excusing two seated members of the jury panel of twelve at the request of the two jurors, after defendant had exhausted its four peremptory

challenges to such panel and plaintiff had not exhausted its peremptories, and in proceeding further [fol. 1121] with the remaining panel of 10 over defendant's objection.

"3. The court erred in limiting the jury's view of defendant's premises and surrounding territory to a very small part of the area which was relevant and pertinent to the issues in the case and about which there was evidence presented at the trial.

"4. The court erred in admitting evidence offered by plaintiff over the objection of this appellant.

"5. The court erred in overruling defendant's motion for judgment on the pleadings, and for a directed verdict at the close of plaintiff's case and at the close of all the evidence.

"6. The court erred in refusing to give to the jury before argument certain written requests to charge submitted by this appellant.

"7. The court erred in submitting to the jury before argument certain special charges submitted by the adverse party and objected to by this appellant.

"8. The court erred in its charge to the jury.

"9. The court erred in refusing to submit to the jury certain special interrogatories to be answered by the jury, as requested by appellant.

"10. The court erred in submitting to the jury an improper, misleading, and incomplete special verdict.

"11. The court erred in entering judgment for plaintiff upon the special verdict returned by the jury, and in not entering judgment for the defendant thereon.

"12. The court erred in overruling appellant's motion for judgment notwithstanding the verdict.

"13. The court erred in overruling appellant's motion for a new trial.

[fol. 1122] "14. The damages assessed by the jury in its special verdict are excessive and appear to have been given under the influence of passion and prejudice.

"15. The damages assessed by the jury are excessive and not sustained by the evidence.

"16. Other errors occurring at the trial and in the judgment."

We do not believe it necessary to discuss in detail each of the assigned errors, but, since this matter is brought under the Federal Employers' Liability Act, our consideration of the problem posed by these assignments of error must be controlled by the interpretation of such act by the Supreme Court of the United States. *Dice* v. *Akron, Canton & Youngstown Rd. Co.*, 91 O. App. 239; *Dice* v. *Akron, Canton & Youngstown Rd. Co.*, 342 U. S. 359; *Harris* v. *Pennsylvania Rd. Co.*, 108 O. App. 541.

> "Under this statute [45 U. S. C. A., Sec. 51] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."
>
> *Rogers* v. *Missouri Pacific Rd. Co.*, 352 U. S. 500, at 506; 77 S. Ct. 443.

The usual concept of proximate causation, as we know it in the law of Ohio, is not to be applied in cases such as we have herein, which arise under the Federal Employers' Liability Act. *Rogers* v. *Missouri Pacific Rd. Co.*, *supra*; *Schulz, Admx.* v. *Pennsylvania Railroad Co.*, 350 U. S. 523, 76 S. Ct. 608.

With these preliminary and fundamental statements of the rules we must follow in determining the instant case, [fol. 1123] let us examine the special findings of the jury to see what they found as to the determinative issues.

The determinative issues may be briefly summarized as follows: Is there some credible evidence to support a finding of employer negligence? Did such negligence play

any part, even the slightest, in producing the "bite" suffered by Mr. Gallick?

We are required, in examining the special finding of a jury, to liberally construe the answers with a view to ascertaining the meaning of such answers. *Kelly v. Boyd Brothers Express, Inc., et al.*, 151 Ohio St. 467, 86 N. E. 2d 608; *Elio v. Akron Transportation Co.*, 147 Ohio St. 363, 71 N. E. 2d 707.

The rule announced by the Supreme Court of the United States, with reference to the effect of local practice rules, such as the interpretation of interrogatories, is found in *Arnold v. Panhandle & Santa Fe Railway Co.*, 353 U. S. 360, 1 L. Ed. 2d 889, 77 S. Ct. 840, wherein that court said that the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.

There are inconsistencies in the answers to the special verdict and the interrogatories made by the jury in the instant case. They did find, however, that the Baltimore and Ohio Railroad Co. was negligent in maintaining the stagnant pool by the side of its tracks. Although the jurors stated that they could not answer the question as to Mr. Gallick being furnished a safe place to work, they did find a cause and effect relationship between the stagnant pool and the bug bite suffered by Mr. Gallick. After its affirmative answer to the proximate causal relationship be- [fol. 1124] tween the stagnant water, the dead rats, the dead pigeons, the insect bite, and the present physical condition of the plaintiff, the jury found no reasonable probability or foreseeability of the Baltimore and Ohio to appreciate this proximate causal relationship between the stagnant water and other conditions leading to the present physical condition of Mr. Gallick.

Are such findings of the jury sufficient to sustain the judgment? It is difficult to reconcile the several pronouncements of the Supreme Court of the United States with reference to the application of the Federal Employers' Liability Act. A liberal attitude on the part of the court majority is apparent, but an adherence to fixed principles is not readily discernible. 69 *Harvard Review* 1441.

In many of the cases which we have examined, the causative factor has been some tangible object owned by the railroad, even though it was only gravel or an oversized cinder in the roadbed. *Webb* v. *Illinois Central Rd. Co.*, 352 U. S. 512, 1 L. Ed. 2d 503; *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 1 L. Ed. 2d 511; *Lavender, Admr.* v. *Kurn, et al.*, 327 U. S. 645, 90 L. Ed. 916.

In the instant case, as well as in *Scutilles* v. *Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 4 L. Ed. 2d 142; *Schulz, Admx.* v. *Pennsylvania Rd. Co.*, 350 U. S. 523, 100 L. Ed. 668; and *Inman* v. *Baltimore & Ohio Rd. Co.*, 361 U. S. 138, 4 L. Ed. 2d 198, that which caused the injury was an outside force, such as an unusual wave, ice on a boat, or a third person.

Through all these cases there runs the underlying general principle that, before a plaintiff may recover dam- [fol. 1125] ages, there must be proof of some causal relationship between the employer negligence and the injury or death of the workman.

In *Tennant, Admx.* v. *Peoria & Pekin Union Ry. Co.*, 321 U. S. 29, 88 L. Ed. 520, the court said:

> "In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. Tiller v. Atlantic Coast Line R. Co., 318 US 54, 67, 87 L. ed. 610, 617, 63 S. Ct. 444, 143 ALR 967.
>
> "Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked,' Galloway v. United States, 319 US 372, 395, 87 L. ed. 1458, 1473, 63 S. Ct. 1077; Atchison, T. & S. F. R. Co. v. Toops, 281 U. S. 351, 74 L. ed. 896, 50 S. Ct. 281."

In the recent case of *Inman* v. *Baltimore & Ohio Rd. Co.*, 361 U. S. 138, 4 L. Ed. 2d 198, the court, after citing with approval the case of *Rogers* v. *Missouri Pacific Rd. Co.*, 352 U. S. 500, 1 L. Ed. 493, said: "The Act does not make the employer an insurer."

In the *Rogers* v. *Missouri Pacific Rd. Co.* case, *supra*, there is an apparent reversal by the court of its position stated in *Tennant, Admx.* v. *Peoria Pekin Union Ry. Co.*, *supra*, and quoted above, wherein a "proximate cause in whole or in part" is necessary before recovery by an in- [fol. 1126] jured employee of the railroad. In the *Rogers* v. *Missouri Pacific Rd. Co.* case, the court, after rejecting the rule of proximate causation, said, with regard to this question:

> " • • • That is language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury.
>
> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to negligence. (Emphasis added.)
>
> "The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with

the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence.

"The employer is stripped of his common-law defenses and for practical purposes the inquiry in these [fol. 1127] cases today rarely presents more than the single question, whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference."

We do know by overwhelming testimony that the pool of stagnant, vermin-infested water was alongside the Baltimore and Ohio tracks for many years prior to the alleged "bite" suffered by Mr. Gallick. We know, by definite evidence, that insects were in and about this stagnant pool. There is a conflict in the testimony (resolved against Baltimore and Ohio) as to whether any insect of the size described by the injured employee might infest this pool, and which insect might "bite" a man.

We have sufficient credible evidence to conclude, as did the jury, that Mr. Gallick suffered a "bite" on railroad property by some insect while working for that railroad. We have an abundance of testimony that from such "bite" severe consequences to Mr. Gallick have ensued.

We can, with reason, say that, to maintain for a period of years a stagnant, vermin-infested pool of water on and over which insects gather, on property where its employees are required to work, could furnish the gravamen of an offense under the Federal Employers' Liability Act.

No similar "bite" or other insect bites were ever complained about, although complaint about the general unsanitary condition at the location of the pool was made to the railroad.

[fol. 1128] Throughout all the cases involving employer liability, in cases such as we have before us, the United States Supreme Court has held that a right to recover is established if, from the facts proved, negligence and its

causal relationship to the injury and damage may reasonably be inferred; a jury question is presented if, with reason, "the conclusion may be drawn that negligence of the employer played any part at all in the injury."

From the facts heretofore set forth, it is obvious that the plaintiff's case, if it is to be sustained, must rest upon inferences to be drawn from the evidence. There is no direct evidence that the existence of the unidentified bug at the time and place had any connection with the stagnant and infested pool.

We observe that proof is the effect of evidence—the establishment of a fact by evidence—and in litigation there may be evidence which does not amount to proof. When there is neither direct evidence, nor reasonable inferences to be drawn from evidence, whether direct or circumstantial, a conclusion based upon such absence of evidence or reasonable inference is mere conjecture, and the drawing of a further inference from conjecture does not amount to proof. In proving a defendant's culpability, the proof must show that the tort is distinctly traceable as one of the efficient antecedents of the damages, and has a share in subjecting plaintiff to injury.

The observation made above refers only to legal cause. We are not here concerned with cause in the so-called "philosophic sense," for the reason that the causes of causes are infinite.

[fol. 1129] If the plaintiff's case is to be sustained, we must infer that this undescribed (except as to size and biting qualities) insect or bug had been attracted to the area in which the plaintiff was hurt by the stagnant pool, and that its bite caused the plaintiff's condition; that the pool created conditions and influences which helped to incubate or furnish an environment for the bug, whose bite was poisonous to the plaintiff; or, that the insect, having traveled from other areas, became contaminated or infected by the pool with a substance injurious to man, and that this substance infected the plaintiff when bitten.

The law is plain that, before the question of causation can be submitted to a jury, the trial judge must decide a preliminary question—*i.e.*, whether from the evidence a jury could reasonably find the existence of a causal

relation. If the judge decides in the affirmative, it will then be for the jury to say whether they do find. In other words, the judge must say whether on the evidence, a causal relation may be reasonably inferred. If the judge rules that it may be so inferred, the jurors then must say whether, from the evidence, the causal relation is inferred by them.

The question of causation should not get to the jury, and the judge should direct a verdict for the defendant, unless the court is of the opinion that a jury can reasonably find that the defendant's tort was an efficient cause of the damage to the plaintiff *and not a mere antecedent fact.*

As we view the record before us, we have a chain of possibilities that the negligence of the defendant might have shared in subjecting the plaintiff to damage and injury, but the proof of a legal causal connection between the negligence and the damage falls short of that required for the consideration of a jury.

[fol. 1130] Whether the insect causing the damage had any connection with the pool of stagnant water on the defendant's premises, or whether it came from the nearby putrid mouth of the Cuyahoga River, or from weeds, or unsanitary places situated on property not owned or controlled by the railroad, presents only a series of guesses and speculations, which speculations make a chain of causation too tenuous to support a conclusion of liability on the part of the railroad.

We determine, therefore, that, where there is, as here, only a guess or speculation of a causal connection between the negligence of the employer and the injury of an employee, no liability attaches, and a judgment based upon such speculation cannot be sustained.

All other claimed errors have been examined, and we find none prejudicial to the rights of the appellant.

The judgment herein is reversed as contrary to law, and final judgment will be entered for the railroad-appellant.

Reversed and final judgment for the appellant.

Doyle, P.J., and Griffith, J., concur.

(Doyle, P.J., and Hunsicker, J., of the Ninth District, and Griffith, J., of the Seventh District, sitting by designation in the Eighth District.)

[fol. 1131]

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT

State of Ohio,
Cuyahoga County, ss.

C.P. 697,202

No. 25,087

No. 25,017

JAMES GALLICK, Appellee,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant.

JOURNAL ENTRY OF JUDGMENT—Filed April 11, 1961

This day this cause, having been previously consolidated with case No. 25,017, came on to be heard upon appeal on questions of law, assignments of error, bill of exceptions, pleadings, transcript of the docket and journal entries in the Court of Common Pleas of Cuyahoga County, Ohio, and briefs, and was argued by counsel and submitted to the Court.

Upon consideration whereof, this Court finds that in the record and proceedings aforesaid there is error manifest upon the face of the record to the prejudice of the appellant, in that the Court of Common Pleas erred:

(1) In overruling appellant's motion for a directed verdict at the close of all the evidence.

(2) In overruling appellant's motion for judgment notwithstanding the verdict.

and in that said Court entered judgment for appellee when such judgment should have been entered for the appellant.

It is therefore considered, ordered, and adjudged by this Court that the judgment of the Court of Common Pleas of Cuyahoga County be and the same is hereby reversed and held for naught. And the Court coming now to render [fol. 1132] the judgment which the Court of Common Pleas of Cuyahoga County ought to have rendered, final judgment is now entered in this Court for the appellant.

It is further ordered that this cause be remanded to the Court of Common Pleas of Cuyahoga County, Ohio, to carry this judgment into effect and for execution; and that the appellant recover from the appellee its costs herein expended, taxed at $..... To all of which, appellee, by counsel, excepts.

All other claimed errors have been examined, and this Court finds none prejudicial to the rights of the appellant. To which appellant, by counsel, excepts.

Ordered, that a special mandate be sent to said Court of Common Pleas to carry this judgment into execution.

Arthur W. Doyle, Presiding Judge, Lynn B. Griffith, Judge, Oscar Hunsicker, Judge.

(Doyle, P.J., and Hunsicker, J., of the Ninth District, and Griffith, J., of the Seventh District, sitting by assignment in the Eighth District.)

[File endorsement omitted]

[fol. 1133]

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT OF OHIO

CUYAHOGA COUNTY

Case No. 25087 Consolidated
With Case No. 25017

JAMES GALLICK, Plaintiff-Appellant,

—vs—

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Defendant-Appellee.

NOTICE OF APPEAL—Filed April 15, 1961

Now comes the above named appellant, James Gallick, and hereby gives notice of this his appeal to the Supreme Court of Ohio, from the judgment and final order rendered by the Court of Appeals of Cuyahoga County, Ohio, on the 11th day of April, 1961.

This appeal is on questions of law and is taken on condition that a Motion to Certify be allowed by the Supreme Court of Ohio, and, further, because the case involves constitutional questions under the Constitution of the State of Ohio and the Constitution of the United States.

A. H. Dudnik, M. I. Nurenberg, 714 Engineers Building, Cleveland 14, Ohio, Main 1-2300, Meyer Cook, Hanna Building, Cleveland, Ohio, Tower 1-5484, Attorneys for Plaintiff-Appellant.

[fol. 1134] Notice of Service (omitted in printing).

[fol. 1135]

IN THE SUPREME COURT OF OHIO

JAMES GALLICK, Plaintiff-Appellant,

—vs—

THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant-Appellee.

MOTION TO CERTIFY

Plaintiff-appellant herein, James Gallick, respectfully moves this honorable Court for an order directing that the Court of Appeals for the County of Cuyahoga, Ohio, certify its record to this Court, for hearing and decision, in the above entitled action, which is Case No. 25087 consolidated with Case No. 25017 on the docket of said Court of Appeals.

Appellant further states that the final order and judgment of said Court of Appeals was rendered on the 11th day of April, 1961, and the appellant herein has filed in said Court of Appeals a Notice of Appeal on the 15th day of April, 1961, a copy of which Notice of Appeal is appended hereto, all as required by law, showing notice of service of said notice upon counsel of record for the defendant and upon said Court of Appeals.

[fol. 1136] Appellant further states that said judgment of the Court of Appeals reversed a judgment entered in favor of the appellant herein by the Common Pleas Court of Cuyahoga County in the sum of Six Hundred Twenty-five Thousand Dollars ($625,000.00) with the costs of this action.

Appellant further states that this case is one of public and great general interest, as will more fully appear from briefs to be filed in support of this Motion, and that there was error in the judgment and proceedings of the Court of Appeals, prejudicial to the rights of this appellant.

A. H. Dudnik, M. I. Nurenberg, 714 Engineers Building, Cleveland 14, Ohio, Main 1-2300, Meyer Cook, Hanna Building, Cleveland, Ohio, Tower 1-5484, Attorneys for Plaintiff-Appellant.

[fol. 1137] Notice of Service (omitted in printing).

[fol. 1138]

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT OF OHIO

CUYAHOGA COUNTY

No. 25087, Consolidated With Case No. 25017

JAMES GALLICK, Plaintiff-Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Defendant-Appellee.

NOTICE OF CROSS-APPEAL TO THE SUPREME COURT—
Filed April 25, 1961

Appellee hereby gives notice of its cross-appeal to the Supreme Court of Ohio from the judgment and final order rendered and entered herein on the 11th day of April, 1961.

This cross-appeal is taken to the Supreme Court on condition that a motion to certify be allowed by that court.

Baker, Hostetler & Patterson, 1956 Union Commerce Building, Cleveland 14, Ohio, MAin 1-0200, Attorneys for Defendant-Appellee.

Notice of Service (omitted in printing).

[fol. 1139] Notice of Service upon the Court of Appeals (omitted in printing).

[fol. 1140]

IN THE SUPREME COURT OF OHIO

JAMES GALLICK, Plaintiff-Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant-Appellee.

MOTION TO CERTIFY RECORD

Now comes The Baltimore and Ohio Railroad Company, appellee, and moves the Court for an order directing the Court of Appeals of Cuyahoga County, Ohio, to certify its record in the cause set forth in the Notice of Cross-Appeal attached hereto, for the reason that this case is one of general and great public interest, as will appear more fully in the brief to be filed by the appellee herein, and that there was error in the judgment and proceeding of the Court of Appeals prejudicial to the rights of appellee.

Appellee states that it has filed in said Court of Appeals a Notice of Cross-Appeal, a copy of which is appended hereto.

Baker, Hostetler & Patterson, 1956 Union Commerce Building, Cleveland 14, Ohio, MAin 1-0200, Attorneys for Defendant-Appellee.

[fol. 1141] Notice of Service (omitted in printing).

[fol. 1142]

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT OF OHIO

ASSIGNMENTS OF ERROR

Plaintiff respectfully contends that the Court of Appeals in rendering final judgment for the defendant, thereby reversing the judgment of the Court of Common Pleas

entered upon a special verdict of the jury, erred to the prejudice of plaintiff in the following respects:

A. Said judgment is contrary to the Constitutions of the United States, the State of Ohio and the Laws of the United States, particularly the Federal Employers' Liability Act, 45 USCA, Sections 51 through 60.

B. The Court of Appeals substituted its judgment in weighing the evidence for that of the jury, contrary to the decisions of the United States Supreme Court construing the Federal Employers' Liability Act.

C. The Court of Appeals erred in finding an insufficiency of evidence that the bug which bit plaintiff came from the negligently maintained stagnant pool and became infected there and was attracted to said pool by the conditions maintained there by defendant, when in fact there was a sufficiency of evidence in the Record on this point.

D. The Court of Appeals erred in determining that the Trial Judge should have directed a verdict for the defendant at the conclusion of the evidence.

E. The Court of Appeals erred in determining that a finding of a causal connection between the negligence of the defendant and the injury to plaintiff would of necessity be based on only guess or speculation when there was a sufficiency of evidence to permit a reasonable inference of said causal connection.

[fol. 1143] F. The Court of Appeals erred in determining that unless the jury could reasonably find that the defendant's tort (i.e., negligence) was an efficient cause of the damage to the plaintiff, the Judge must direct a verdict for the defendant, as such a standard of causal connection is contrary to the decisions of the United States Supreme Court under the Federal Employers Liability Act.

[fol. 1144]

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT OF OHIO

CROSS-ASSIGNMENTS OF ERROR

Appellee says that there was error prejudicial to this appellee in the judgment and final order of the Court of Appeals, in that the Court of Appeals overruled all of the appellee's assignments of error to that court, among which were the following:

I. The trial court erred in the impaneling of the jury.

II. The trial court erred in admitting certain evidence offered by the appellant and objected to by the appellee.

III. The trial court erred in refusing to give certain special charges submitted by appellee.

IV. The trial court erred in giving certain special charges submitted by appellant and objected to by appellee.

V. The trial court erred in its general charge to the jury.

VI. The trial court erred in refusing certain special interrogatories submitted by appellee.

VII. The trial court erred in submitting a special verdict which denied to appellee its rights under federal law, and which was legally improper and incomplete under Ohio law.

VIII. The trial court erred in entering judgment for appellant upon the special verdict.

IX. The trial court erred in not entering judgment for the appellee upon the special verdict.

X. The amount of damages assessed by the jury is excessive, is not sustained by the evidence, and appears to have been given under the influence of passion and prejudice.

XI. Other errors manifest on the face of the record.

[fol. 1145]

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT

STATEMENT OF QUESTIONS PRESENTED

1. Is an order directing a verdict for the defendant because the proof of causal connection fails to rise above the level of "speculation and conjecture" a denial of plaintiff's constitutional guarantee of trial by jury under the Federal Employers' Liability Act, 45 U. S. C. A. 51?

2. Has the Court of Appeals the jurisdictional power to remove the instant cause from the jury by weighing the evidence and finding it insufficient on the issue of legal causation?

3. Where there is some evidence in the record for the jury to infer legal causation between the defendant's negligence and the plaintiff's injury, may the Court of Appeals determine, as a matter of law that such evidence is not "proof" but merely "speculation and conjecture" and thereby remove this cause from the consideration of the jury?

4. Did the Court of Appeals apply a proper standard to determine the requirements of legal causation in this action under the Federal Employers' Liability Act, 45 U. S. C. A. 51, in requiring proof of an "efficient" cause?

[fol. 1146]

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT

THE CONSTITUTIONAL QUESTION

The controlling constitutional authority for the Federal Employers' Liability Act is, of course, Article I, Section 8 of the Constitution of the United States, vesting exclusively in the Congress of the United States the power to regulate commerce among the several states. Inasmuch as defendant has conceded that at the times plaintiff was working

for the railroad, plaintiff was engaged in Interstate Commerce, he clearly comes within the protective powers of this Section of the Constitution of the United States. As shall be demonstrated hereafter under the Argument and law in support of this Brief, this Section of the Constitution of the United States has in effect been construed by the Supreme Court of the United States to be in *pari materia* of Amendment VII of the Bill of Rights preserving the right of trial by jury. To the same effect is Article I, Section 5 of the Bill of Rights of the Constitution of the State of Ohio.

[fol. 1147]

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT

THE MATTER OF PUBLIC OR GREAT GENERAL INTEREST

While there have been many decisions of the United States Supreme Court and of the Appellate Courts of this State delineating the standards or tests of *what constitutes* legal causation in an action brought under the Federal Employers' Liability Act, Section 51, there has as yet been no interpretation by this Court as to the *sufficiency of proof* required to sustain that specific issue in an action brought under the Act. Likewise there has been no construction by this Court of the relative functions of Court and jury, particularly Appellate Court jurisdiction, to pass upon the specific issue of sufficiency of the evidence to establish legal causation, as distinguished from the power to pass upon the sufficiency of the evidence to prove negligence.

Section 51 of the Act refers to injury "resulting in whole or in part" from the negligence of the carrier. The word "negligence" as used in Section 51 is not defined by the Statute and therefore, of course, would take its common law definition. However, the phrase "resulting *in part* from the negligence" has no counterpart in common law jurisprudence. The Court of Appeals in the instant case apparently applied common law standards on the question of sufficiency of proof to establish causal con-

nection. We believe that the question of whether or not the common law standards of sufficiency of proof on the issue of causal connection, as distinguished from the issue of negligence, and the power of Appellate Court review of the jury's findings pertaining to this question, requires clarification by this Court.

[fol. 1148]

IN THE SUPREME COURT OF OHIO

Case No. 37218

JAMES GALLICK, Plaintiff-Appellant,

v.

BALTIMORE AND OHIO RAILROAD COMPANY,
Defendant-Appellee.

Date Memoranda of Pleadings, &c., Filed, Writs Issued, &c., Judgments, Orders and Decrees

* * * * * * *

Journal 44, Page 454
Motion for an Order Directing the Court of Appeals for Cuyahoga County to Certify Its Record

It is ordered by the Court that this motion is overruled.

Journal 44, Page 454
Cross Motion for an Order Directing the Court of Appeals for Cuyahoga County to Certify Its Record

It is ordered by the Court that this motion is overruled.

Journal 44, Page 454
Motion by Appellee to Dismiss Appeal as of Right. Cuyahoga County.

It is ordered by the Court that this motion is sustained.

Journal 44, Page 458
Appeal From the Court of Appeals for Cuyahoga County.

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County was heard in the manner

prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no debatable constitutional question exists herein.

It is further ordered that the defendant-appellee recover from the plaintiff-appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

[fol. 1149] [File endorsement omitted]

[fol. 1150]

No. 37218

IN THE SUPREME COURT OF OHIO

Appeal From
The Court of Appeals of Cuyahoga County

JAMES GALLICK, Plaintiff-Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Defendant-Appellee.

APPLICATION OF DEFENDANT-APPELLEE FOR RE-HEARING OF ITS CROSS-MOTION TO CERTIFY—Filed December 14, 1961

Defendant-appellee, The Baltimore and Ohio Railroad Company, hereby applies for a re-hearing of its Cross-Motion to Certify on the grounds and for the reason that the record herein presents numerous questions not passed upon by the Court of Appeals, some of which, if decided in favor of defendant-appellee, would provide grounds in addi-

tion to and independent of those stated by the Court of Appeals for the entry of final judgment in favor of defendant-appellee. Other such questions, if so decided, would require an alternative order for a new trial in the event the present judgment of the Court of Appeals should be reversed.

The questions referred to include, but are not limited to: (1) whether the special verdict of the jury, including its finding that there was no reason for defendant-appellee to anticipate that its alleged negligence "would or might probably result in a mishap or an injury," legally requires the entry of final judgment for defendant-appellee, or would legally permit entry of final judgment for plaintiff-appellant; (2) whether the trial court erred in permitting plain-
[fol. 1151] tiff-appellant's expert medical witnesses to answer the hypothetical question addressed to them, in the absence of which there would be no proof in the record whatsoever of causal connection; (3) whether the trial court erred in permitting employees of defendant-appellee to be called for cross-examination by plaintiff-appellant under Ohio Revised Code §2317.52; (4) whether the amount of damages found by the jury in its special verdict was grossly excessive; and (5) other substantive and procedural questions affecting defendant-appellee's constitutional right to a fair and impartial trial.

Defendant-appellee says that since the announcement of this Court's decision on December 7, 1961, counsel for plaintiff-appellant has filed notice in this Court of his intention to petition the United States Supreme Court for a writ of certiorari herein, pursuant to which the case may be heard upon the merits by that Court; that in the event of a reversal by the United States Supreme Court and the entry of final judgment for plaintiff, defendant will have been denied its legal right to have all of the foregoing questions determined by an appellate court of the State of Ohio; and that said questions involve matters of Ohio law which are of great and general public interest and importance and upon which the United States Supreme Court is powerless to rule.

Respectfully submitted.

Russell E. Leasure, Alexander H. Hadden, Baker, Hostetler & Patterson, Attorneys for Defendant-Appellee.

[fol. 1152]

IN THE SUPREME COURT OF OHIO

Journal 44, Page 511

Application for Rehearing

Upon consideration of the application for rehearing, it is ordered that rehearing is denied.

[fol. 1153] [File endorsement omitted]

No. 37218

IN THE SUPREME COURT OF OHIO

Appeal from the Court of Appeals of Cuyahoga County, Eighth Judicial District of Ohio.

JAMES GALLICK, Plaintiff-Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant-Appellee.

NOTICE OF APPEAL—Filed January 25, 1962

Now comes the above named appellant, James Gallick, and hereby gives notice of his appeal to the Supreme Court of the United States from the judgment and orders of the Supreme Court of Ohio denying the motion of appellant herein to certify the record and judgment of the Court of Appeals of Cuyahoga County and dismissing the appeal of appellant on constitutional questions on the order of the Supreme Court of Ohio that no debatable constitutional question was involved.

Said appeal of appellant herein involves questions concerning the Constitution of the United States of America and is taken on condition that a petition for writ of certio-

rari be granted by the Supreme Court of the United States on questions of law.

A. H. Dudnik, M. I. Nurenberg, 714 Engineers Building, Cleveland 14, Ohio, Meyer Cook, Hanna Building, Cleveland, Ohio, Attorneys for Plaintiff-Appellant.

[fol. 1154] Notice of Service (omitted in printing.)

[fol. 1155]

SUPREME COURT OF THE UNITED STATES

No. 765—October Term, 1961

JAMES GALLICK, Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY

ORDER ALLOWING CERTIORARI—April 16, 1962

The petition herein for a writ of certiorari to the Court of Appeals of the State of Ohio, Cuyahoga County, is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter and Mr. Justice White took no part in the consideration or decision of this application.